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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

SUSAN BUCKLEY
ANNE B. CARROLL
CAHILL GORDON & REINDEL
New York, New York

RAYMOND V. MILLER
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN, P.A.
Miami, Florida

ALAN N. BRAVERMAN
STEPHANIE S. ABRUTYN
AMERICAN BROADCASTING COS., INC.
New York, New York

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

QUESTIONS PRESENTED

1. When parties who have agreed upon settlement of an action that has resulted in a judgment entered on a jury verdict seek vacatur of the judgment pursuant to their settlement agreement, may a third party who could use the judgment to collaterally estop an action brought by the defendant against whom it was entered intervene as of right under Federal Rule of Civil Procedure 24(a) to oppose the vacatur on the basis of the principles articulated in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994)?

2. May a district court judgment be vacated, consistently with *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), when no new factual or legal developments have occurred after entry of judgment except the agreement of the parties to settle the case?

PARTIES BELOW

The underlying litigation involves three consolidated securities fraud class actions. The named plaintiff-class representatives in each of the three actions are, respectively, John D. and Debra A. Purcell, William A. and Else M. Smith, and Timothy J. Chelling. BankAtlantic Financial Corporation and Alan B. Levan are defendants in all three actions. The parties below also included the following corporations which are wholly-owned subsidiaries of defendant BankAtlantic Financial Corporation: I.R.E. Advisors Series 23 Corporation, defendant in the *Purcell* case; I.R.E. Advisors Series 24 Corporation, defendant in the *Smith* case; and I.R.E. Advisors Series 21 Corporation, defendant in the *Chelling* case.

American Broadcasting Companies, Inc. and William H. Willson, the petitioners here, applied for intervention in the district court.

Rule 29.6 Statement

American Broadcasting Companies, Inc. is a wholly owned subsidiary of ABC Holding Company, Inc., a wholly owned subsidiary of Capital Cities/ABC, Inc., which, in turn, is a wholly owned subsidiary of The Walt Disney Company.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
A. Proceedings Below	3
B. The Decision of the Court of Appeals	8
REASONS FOR GRANTING THE WRIT	10
RESOLUTION BY THIS COURT OF WHETHER A THIRD PARTY MAY INTERVENE TO OPPOSE VACATION OF A JUDGMENT THAT WOULD COLLATERALLY ESTOP AN ACTION AGAINST IT BY A SETTLING PARTY AND WHEN SUCH A JUDGMENT MAY BE VACATED IS CRITICAL TO THE IMPLEMENTATION OF THE COURT'S RULING IN *U.S. BANCORP MORTGAGE CO.* v. *BONNER MALL PARTNERSHIP* AND WOULD RESOLVE A SIGNIFICANT CONFLICT AMONG THE CIRCUITS	10

PAGE

CONCLUSION 25

APPENDIX 1a

Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit in *Purcell* v. *BankAtlantic Financial Corp.*, June 25, 1996 (affirming the District Court judgment) 1a

Final Judgment Approving Settlement and Order of Dismissal of the District Court for the Southern District of Florida in *Purcell v. BankAtlantic Financial Corp.*, Sept. 12, 1994 (vacating the Dec. 18, 1992 judgment and Dec. 17, 1992 jury verdict) 13a

Order [ ] Clarifying Previous Order Denying Motion to Intervene of the District Court for the Southern District of Florida in *Purcell* v. *Bank-Atlantic Financial Corp.*, July 15, 1994 ..... 19a

Order Denying Motion to Intervene of the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*, June 30, 1994 ..... 21a

Excerpt of Trial Transcript of the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*, Dec. 17, 1992 (recording jury verdict) 23a

Final Judgment of the District Court for the Southern District of Florida in *Purcell* v. *Bank-Atlantic Financial Corp.*, Dec. 18, 1992 (entering judgment on jury verdict of Dec. 17, 1992) 27a

PAGE

Order Denying BAFCO Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial of the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*, Mar. 19, 1993 .... 30a

Order Denying BAFCO Defendants' Motion Requesting Remittitur Order of the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*, Mar. 19, 1993 .... 32a

Order on Plaintiffs' Motion to Amend Judgment to Add Pre-Judgment Interest of the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*, June 28, 1993 .... 34a

Order of the United States Court of Appeals for the Eleventh Circuit dismissing appeals in *Purcell* v. *BankAtlantic Financial Corp.*, Feb. 11, 1994.. 40a

Federal Rule of Civil Procedure 24(a)..... 44a

Amended Complaint of Intervenors in the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*, July 1, 1994 ..... 45a

"[Proposed] Final Judgment Approving Settlement and Order of Dismissal," undated (submitted by settling parties for signature and entry by the District Court for the Southern District of Florida in *Purcell* v. *BankAtlantic Financial Corp.*)..... 52a

Omnibus Order of the District Court for the Southern District of Florida in *Levan* v. *Capital Cities/ABC, Inc.*, Mar. 19, 1994 ..... 58a

PAGE

Order on Report and Recommendation of the District Court for the Southern District of Florida in *Levan* v. *Capital Cities/ABC, Inc.*, June 6, 1994 ..... 63a

Notice to Counsel of the District Court for the Southern District of Florida in *Levan* v. *Capital Cities/ABC, Inc.*, Aug. 18, 1995 ..... 65a

TABLE OF AUTHORITIES

Cases PAGE

American National Bank & Trust Co. v. *City of Chicago*, 865 F.2d 144 (7th Cir. 1989) 20

Blake v. *Pallan*, 554 F.2d 947 (9th Cir. 1977) 20

Brody v. *Spang*, 957 F.2d 1108 (3d Cir. 1992) 21

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) 19, 20

Clarendon Ltd. v. *Nu-West Industries, Inc.*, 936 F.2d 127 (3d Cir. 1991) 11

Conservation Law Foundation, Inc. v. *Mosbacher*, 966 F.2d 39 (1st Cir. 1992) 18

County of Fresno v. *Andrus*, 622 F.2d 436 (9th Cir. 1980) 18

Donaldson v. *United States*, 400 U.S. 517 (1971) 2n, 19, 20

Federal Data Corp. v. *SMS Data Products Group, Inc.*, 819 F.2d 277 (Fed. Cir. 1987) 11

Feller v. *Brock*, 802 F.2d 722 (4th Cir. 1986) 20, 21

Harper v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993) 15n

International Union, UAW, Local 283 v. *Scofield*, 382 U.S. 205 (1965) 2n

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) ..... *passim*

Jansen v. *City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990) 21

PAGE

John Morrell & Co. v. *Local Union 304A, United Food and Commercial Workers*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991)..... 8n

Kaufman v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952)..... 2n

Martin v. *Travelers Indemnity Co.*, 450 F.2d 542 (5th Cir. 1971)..... 17n

In re Memorial Hospital, 862 F.2d 1299 (7th Cir. 1988)..... 12

Meridian Homes Corp. v. *Nicholas W. Prassas & Co.*, 683 F.2d 201 (7th Cir. 1982)..... 19-20

Meyer Goldberg, Inc. v. *Goldberg*, 717 F.2d 290 (6th Cir. 1983)..... 19

Moore v. *Comfed Savings Bank*, 908 F.2d 834 (11th Cir. 1990)..... 17n

Motta v. *District Director of INS*, 61 F.3d 117 (1st Cir. 1995)..... 24n-25n

Mountain Top Condominium Ass'n v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361 (3d Cir. 1995). 17

National Union Fire Insurance Co. v. *Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989)..... 16n, 20

Natural Resources Defense Council, Inc. v. *United States Nuclear Energy Comm'n*, 578 F.2d 1341 (10th Cir. 1978)..... 20, 20-21

Nestle Co. v. *Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985)..... 11, 12

PAGE

New Orleans Public Service, Inc. v. *United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984) 20

Nuesse v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967) 18, 21n

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) . 21n

Piambino v. *Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980) 17-18

Pioneer Investment Services Co. v. *Brunswick Assocs. Limited Partnership*, 507 U.S. 380 (1993) 24n

Seminole Tribe v. *Florida*, 116 S. Ct. 1114 (1996) 24n

Solien v. *Misc. Drivers and Helpers Union, Local No 610*, 440 F.2d 124 (8th Cir.), *cert. denied*, 403 U.S. 905 (1971) 18

Smuck v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969)..... 18

Stolz v. *American International Life Assurance Co.*, 922 F. Supp. 435 (W.D. Wash. 1996) 15n

In re United States, 927 F.2d 626 (D.C. Cir. 1991) 11-12

United States v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984)..... 18

United States v. *Virginia*, 64 U.S.L.W. 4638 (U.S. June 26, 1996) 24n

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994) .....*passim*

Warth v. *Seldin*, 422 U.S. 490 (1975)..... 2n

PAGE

Law Reviews:

Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227 (1990) 19n

Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loy. L.A. L. Rev. 1033 (1993) 12n

Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589 (1991) 12n-13n

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Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 Ariz. St. L.J. 853 (1989) 17n, 19n

Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 Wash. & Lee L. Rev. 1229 (1993) 13n

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William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, 96 Yale L.J. 860 (1987) 13n

Rules:

Fed. R. Civ. P.

Rule 17(a) 17n

PAGE

Rule 19 ..... 17n

Rule 24 ..... *passim*

Rule 24(a) ..... *passim*

Rule 24 advisory committee's note 17n

Rule 50 23

Rule 59 23

Rule 60(b) 24n

Rule 60(b)(6) 24n

Statutes:

Judicial Code

28 U.S.C. § 1254(1) (1992) 2, 2n

28 U.S.C. § 1331 (1992) 3n

Treatises:

18 Charles A. Wright *et al.*, *Federal Practice and Procedure* (1981 & Supp. 1996) 8n

7C Charles A. Wright *et al.*, *Federal Practice and Procedure* (2d ed. 1986 & Supp. 1996) 19n

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case, entered on June 25, 1996.

OPINIONS BELOW

The opinion of the court of appeals is reported at 85 F.3d 1508 and is reprinted in the Appendix hereto at 1a-12a. The district court order incorporating its "Final Judgment Approving Settlement and Order of Dismissal" is unreported and is reprinted in the Appendix hereto as 13a-18a. The district court's orders denying petitioners' motion for intervention are at 19a-22a.

JURISDICTION

The judgment of the court of appeals from which petitioners seek review was entered on June 25, 1996. This petition is timely filed within 90 days of that decision. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1992).[1]

STATUTORY PROVISIONS INVOLVED

The text of Rule 24(a) of the Federal Rules of Civil Procedure ("Intervention of Right") is set forth in the Appendix hereto at 44a.

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[1] Under longstanding precedents of this Court, the provision of 28 U.S.C. § 1254(1) that a writ of certiorari may be granted "upon the petition of any party" does not preclude such a grant to petitioners here. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) ("One who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling.") (citing *International Union, UAW, Local 283* v. *Scofield*, 382 U.S. 205, 208-09 (1965))). The Court has, in fact, frequently granted writs to unsuccessful applicants for intervention in both trial and appeals court proceedings who have sought review of the denial of intervention. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 493 (1975); *Donaldson* v. *United States*, 400 U.S. 517, 521-22 (1971); *Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 158 (1952).

STATEMENT OF THE CASE

A. Proceedings Below

In 1989, three class actions (consolidated in what is here referred to as the "*Purcell* action") were filed against defendants BankAtlantic Financial Corporation ("BFC"), Alan B. Levan ("Levan"), and other entities and individuals, on behalf of a group of BFC's and Levan's former limited partners in three real estate public limited partnerships. R. 1-1.[2] In transactions proposed by BFC and Levan, these limited partners' interests had been "exchanged" (over their dissenting votes or non-votes) for 20-year, unsecured, subordinated debentures of BFC, a savings and loan holding company controlled by Levan. *Id.* The complaint alleged that the transactions (known as "rollups") were perpetrated fraudulently in violation of federal securities laws and state law. Plaintiffs sought damages and rescission of the debentures on behalf of the class. *Id.*

In December 1992, the action was tried in the United States District Court for the Southern District of Florida.[3] The critical question in the case was whether the defendants had committed securities fraud by representing in the prospectus and the accompanying transmittal letter that "the managing general partners, the company and Alan B. Levan believe that the exchange is fair to the limited partners" when they knew that it was not. R. 12-345-1597. At the conclusion of the two-week trial, the jury determined that BFC and Levan had in fact committed securities fraud. App. 25a. In response to special interrogatories, the jury found that the rollups proposed by BFC and Levan were unfair to their limited partners and

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[2] Citations to "R.__" are references to the Record on Appeal in the Eleventh Circuit. Citations to "App.__" refer to the Appendix to this Petition.

[3] The district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331 (1992).

that BFC and Levan had falsely stated to them that they believed that the transactions were fair when they actually believed otherwise. *Id.* Eight million dollars in damages was awarded to the plaintiff class. App. 26a.

The district court entered its Final Judgment on the jury's verdict in favor of the class plaintiffs, App. 27a-29a, and subsequently denied the defendants' motions for remittitur and for judgment notwithstanding the verdict or for a new trial, App. 30a-33a. In June, 1993, in an order on the class plaintiffs' motion to amend the judgment to add pre-judgment interest, the district court set out its reasons for denying judgment n.o.v.:

> In this case, a jury has found, in essence, that a certain securities swap of subordinated debentures for limited partnership interests was so fundamentally unfair that Alan Levan, as managing general partner, could not have believed it to be fair when he allowed his statement of fairness to be included in the issuing prospectus. The jury apparently believed that where the Bankatlantic bonds were subordinated and unsecured, where there was no mandatory schedule of interest payments, and where the principal owing was not due for twenty years after issuance, the exchange of those bonds for I.R.E. limited partnership interests was inherently unfair. This Court cannot say that the jury's verdict was irrational or without factual or evidentiary foundation, and has accordingly denied Defendants' motions for judgment as a matter of law and in the alternative for a new trial in prior orders.

App. 37a. The *Purcell* defendants (hereinafter collectively "BFC" or "BFC and Levan") filed a notice of appeal from the judgment and post-trial orders.

At the same time BFC and Levan were defending the *Purcell* action, they were also pursuing a libel and false light action in the same court against petitioners (hereinafter

"ABC"), captioned *Levan* v. *Capital Cities/ABC, Inc.* (the "*Levan* action"). App. 48a. In that suit, BFC and Levan claim that they were defamed by a November 1991 news report broadcast on the ABC News program "20/20" that criticized the same rollup transactions at issue in *Purcell*. *Id.* Seven months after the jury verdict in *Purcell*, a United States Magistrate Judge sitting in the *Levan* case issued a Report and Recommendation that summary judgment be granted to ABC on the ground that the *Purcell* judgment and verdict collaterally estopped BFC and Levan from relitigating the question of whether the rollups were fair and that the substantial truth of the broadcast had thus been established. App. 4a.

Before the district judge presiding in the *Levan* case had ruled on the magistrate's Report, the Eleventh Circuit dismissed the appeal in *Purcell* on the ground that because the district judge in *Purcell* had not yet entered his order disposing of the class plaintiffs' claim for equitable rescission of the 20-year debentures, the district court's Final Judgment for damages was not yet appealable. App. 43a. In March 1994, the *Levan* court stayed the libel suit until the rescission claim in *Purcell* was disposed of, observing that entry of such a final judgment in *Purcell* "would have a binding and preclusive effect in this [the *Levan*] case." App. 59a.

BFC and Levan responded by seeking to erase the jury's verdict and the resulting Final Judgment through a settlement. As summarized by the court of appeals:

> After the magistrate judge recommended summary judgment for ABC in the libel lawsuit, Levan and BFC began working on a settlement with the plaintiffs in the class action case. They reached an agreement in which the defendants would pay the plaintiffs the full amount of the damages that the jury had awarded them, plus interest, in exchange for a stipulated motion to vacate the jury verdict and resulting judgment.

App. 4a (footnote omitted).

On June 6, 1994, having been advised of the parties' contemplated settlement, the *Levan* court entered an order concluding that because, in light of the possible settlement, the judgment "may no longer be 'final,' " the magistrate's recommendation that summary judgment be granted to ABC on BFC's and Levan's libel claims would be rejected. App. 64a. The matter was referred to the magistrate "for further consideration in light of the circumstances in *Purcell*." *Id.*

ABC promptly moved to intervene in *Purcell*, as of right or permissively, for the limited purpose of contesting the effort to obtain a vacatur of the verdict and judgment. The motion was opposed by both the *Purcell* plaintiffs and defendants. The *Purcell* court entered orders, without opinion, denying the motion to intervene. App. 19a-22a. ABC appealed from the orders. App. 5a & n.2.

On July 27, 1994, the *Purcell* parties filed a Stipulation of Settlement with the district court under which BFC and Levan proposed to pay the plaintiff class the full $8 million awarded by the jury, plus interest. App. 4a & n.1.[4] The stipulation incorporated a "[Proposed] Final Judgment Approving Settlement and Order of Dismissal," App. 52a-57a, drafted in its entirety by BFC's counsel, which provided that:

> [T]he December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use

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[4] Because the settlement was made contingent not only on the district court's vacatur of the verdict and judgment but also on a resolution upholding the vacatur of any appeals challenging it, R. 3-433-13, -22, it has not to date been consummated.

> against defendants, its [sic] successors or assigns, by plaintiffs or any third parties.

App. 56a.

The proposed judgment drafted by BFC's counsel further asserted, *inter alia*, that the *Purcell* court had itself "entertained serious doubts as to the merit" of the case, that the appeal of it was "hardly frivolous" and that the court had denied a directed verdict and JNOV despite its "serious reservations about the award and . . . the legal rulings upon which it is based" because it "was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review." App. 53a, 54a. The proposed order did not address or even refer to the conclusions embodied in the district court's June 1993 order, denying judgment n.o.v. because the jury verdict was neither "irrational [n]or without factual or evidentiary foundation."

At a hearing on September 12, 1994, the *Purcell* court approved the settlement and signed a final judgment of vacatur identical in every respect to the proposed judgment written by BFC's counsel. App. 13a-18a. Neither party asserted, nor did the *Purcell* court purport to find, any change in the law or facts between the time the court entered its original judgment and then denied judgment n.o.v. and the time the court vacated the judgment. The only new facts were the magistrate's recommendation in favor of summary judgment in *Levan* and the resulting *Purcell* settlement.[5]

ABC then filed a second notice of appeal from both the denial of its intervention motion and from the stipulated judg-

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[5] On April 17, 1995, the *Levan* magistrate recommended that ABC be denied summary judgment in light of the vacation of the *Purcell* judgment. On July 12, 1996, the trial court in *Levan* adopted the Magistrate's R&R, denying summary judgment on the basis of the vacation of the *Purcell* judgment. Although neither ruling is part of the record on appeal, ABC will lodge them with the Court at its request.

ment vacating the jury verdict and the judgment based on it. App. 5a n.2. The two appeals were consolidated. *Id.*[6]

B. The Decision of the Court of Appeals

In an opinion rendered on June 25, 1996, App. 1a-12a, the Eleventh Circuit acknowledged that "unless vacated, the jury verdict and judgment in the class action will preclude [BFC's and Levan's] libel claim against ABC."[7] App. 11a. Nonetheless, the court affirmed the denial of ABC's motion to intervene in the *Purcell* case and, having done so, declared itself to be without jurisdiction to "reach ABC's argument regarding the propriety of the district court's approval of the settlement agreement." App. 6a.

In finding that ABC was not entitled to intervene as of right, the court rejected the contention that opposing vacatur of a judgment that would be preclusive in another case was an interest sufficient to support intervention under Rule 24(a). App. 9a. The court premised its result on the view that

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[6] The *Purcell* plaintiffs moved to dismiss ABC's appeal on the ground that the court of appeals had no jurisdiction to hear the matter because, they urged, the case was moot and ABC lacked standing to contest the result. The court of appeals denied the motion, since a decision favorable to ABC on the intervention question would bring the merits of the judgment of vacatur before it for review. App. 5a & n.3.

[7] The court thus implicitly accepted ABC's argument that although the Final Judgment entered by the *Purcell* court on the jury verdict was not "final" enough for appeal purposes (because it did not dispose of plaintiffs' claim for equitable rescission of the 20-year bonds), it and the verdict itself were sufficiently final for preclusion purposes. This proposition has been widely accepted by the Courts of Appeals. *See, e.g., John Morrell & Co.* v. *Local Union 304A, United Food and Commercial Workers*, 913 F.2d 544, 563-64 (8th Cir. 1990) (defendants collaterally estopped from relitigating issues determined by jury's verdict on liability even though the damages phase of the prior action was not concluded), *cert. denied*, 500 U.S. 905 (1991); *see generally* 18 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 4434 (1981 & Supp. 1996) (collecting cases).

Eleventh Circuit authority requires an intervenor of right to "be at least a real party in interest in the transaction which is the subject of the proceeding" and to have a "direct, substantial, legally protectable interest in the proceedings." App. 7a, 8a-9a. Noting that ABC "admits it is not a real party in interest as to [the debenture] exchange transactions" underlying the class action, the court found that ABC failed to meet that standard. App. 8a-9a. The court further asserted—without any discussion of this Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994)—that ABC's interest in the preclusive effect of the *Purcell* disposition was "too collateral, indirect, and insubstantial to support intervention as of right," and that ABC's intervention "would also run counter to the public policy values that are furthered by permitting parties to settle a case without the interference of interlopers." App. 9a.

Acknowledging the truth of "ABC's assertion that without intervention it will have no way to preserve the preclusive effect of the jury verdict and judgment in the class action," the court stated that "a nonparty is not necessarily entitled to preserve the beneficial effects of a jury verdict and judgment, however much the nonparty may cherish those effects." App. 11a. Without reference to collateral estoppel principles, or to the serious public interests articulated in *U.S. Bancorp* against the vacation of judgments, the court concluded that ABC would have an opportunity in a trial of the libel action to relitigate "in the old-fashioned way" the identical issues that had been determined against BFC and Levan in the *Purcell* action. App. 11a.

REASONS FOR GRANTING THE WRIT

RESOLUTION BY THIS COURT OF WHETHER A THIRD PARTY MAY INTERVENE TO OPPOSE VACATION OF A JUDGMENT THAT WOULD COLLATERALLY ESTOP AN ACTION AGAINST IT BY A SETTLING PARTY AND WHEN SUCH A JUDGMENT MAY BE VACATED IS CRITICAL TO THE IMPLEMENTATION OF THE COURT'S RULING IN *U.S. BANCORP MORTGAGE CO.* v. *BONNER MALL PARTNERSHIP* AND WOULD RESOLVE A SIGNIFICANT CONFLICT AMONG THE CIRCUITS.

This case raises the question of how a recent seminal ruling of this Court can be given meaningful effect when the crabbed rules on intervention that are currently in force in some—but not all—circuits are used to deny party status to the very entities that are intended to be the beneficiaries of the ruling. The case at issue, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994), broadly held that litigated judgments have substantial importance to the federal judicial system as a whole that transcends their value to the litigants. Under *U.S. Bancorp*, parties may freely settle their claims and bind each other in any appropriate way. They are limited, however, in their power to use settlement as a means to expunge judgments from public records and thus to usurp the public benefit of those judgments. As a result, once a judgment is entered it may not become a settlement pawn to be routinely purchased and sold at will by the litigants. Rather, in the absence of "exceptional circumstances"—circumstances that do *not* include the desire of one of the parties to erase disagreeable rulings by manipulating the judicial process—such judgments may be relied upon by the courts and third parties to whatever effect the law allows.

In this case, BFC and Levan were held by a jury to have engaged in civil fraud under federal securities laws. Under routine application of collateral estoppel principles, that determination would—as the court of appeals recognized—have barred them from pursuing a libel case against ABC that turns on the very issue that was resolved by the jury's verdict and the resulting judgment. Nonetheless, the district court held that because ABC could not intervene to oppose the agreed-upon vacatur (in return for the payment, dollar for dollar, of the very judgment entered by the district court), the judgment and the verdict are to be vacated. Thus, the only entity with an interest in seeking to enforce the clear mandate of *U.S. Bancorp* was not even permitted an opportunity to be heard on the issue.

This case thus involves two important and inextricably intertwined issues: the need to enforce a seminal ruling of this Court and the need to resolve a major circuit conflict about the kind of interest required for intervention as of right under Rule 24(a)(2). That the effect of the Eleventh Circuit's restrictive views on intervention is to preclude enforcement of this Court's ruling on the relationship of settlement to outstanding judgments makes this case all the more worthy of this Court's plenary review.

U.S. Bancorp and the Vacatur of Judgments

For a number of years prior to 1994, there was a significant circuit split as to whether federal courts would, on the application of parties who had already tried their cases through judgment, vacate those judgments if the parties requested them to do so as an element of settlement. Some circuits did so routinely. *See, e.g., Federal Data Corp.* v. *SMS Data Products Group, Inc.*, 819 F.2d 277, 279 (Fed. Cir. 1987); *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280, 282-84 (2d Cir. 1985). Others refused to do so. *See, e.g., Clarendon Ltd.* v. *Nu-West Industries, Inc.*, 936 F.2d 127, 129 (3d Cir. 1991); *In*

re United States, 927 F.2d 626, 627 (D.C. Cir. 1991); *In re Memorial Hospital*, 862 F.2d 1299, 1302-03 (7th Cir. 1988).

Proponents of the former position maintained that in a system of private litigation, parties should be free to—and, indeed, encouraged to—settle and that a request by parties to vacate a judgment as a condition of settlement should routinely be honored. *See Nestle*, *supra*, 756 F.2d at 283 ("the importance of honoring settlements" outweighs the value of the finality of judgments). Proponents of the latter position urged that judicial rulings were themselves presumptively valuable to the public at large and that losing parties who had chosen to litigate through judgment should not be free simply to buy off disagreeable precedents via settlement. *See Memorial Hospital*, *supra*, 862 F.2d at 1303 ("When a clash between genuine adversaries produces a precedent, . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. . . . To the extent an opinion permits the invocation of [collateral estoppel], it may have great value to strangers—a value that one or another party to today's case may try to appropriate in the settlement, but which is not theirs to sell.")[8]

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[8] *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loy. L.A. L. Rev. 1033, 1078 (1993) ("When wealthy parties can use their money to turn court judgments around, while parties lacking the cash cannot, the courts may no longer be viewed as neutral public arbiters of justice and law, but as one more institution where the dollar calls the tune. A goddess of justice who wears a blindfold, an aspiration that the law treat rich and poor alike, these ideals are subverted by a rule of law that frankly allows private parties to buy off the judgments of the public courts."); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 593, 631 (1991) ("[T]he effect of vacatur . . . extends beyond judicial waste; it perverts the judicial decision into a negotiable commodity, engendering distortion of, and disrespect for, the role of the courts. . . . If a judicial system in which the rights of the parties are

In 1992, this Court determined to resolve the issue. It granted a writ of certiorari in *Izumi*, *supra*, to decide whether " 'the United States Courts of Appeals [should] routinely vacate district court final judgments at the parties' request when cases are settled while on appeal.' " 510 U.S. at 30. After argument, however, the writ was dismissed as improvidently granted because of the failure of petitioner to seek review of the threshold question of whether petitioner, a third party seeking the benefits of collateral estoppel of the judgment the parties sought to vacate by their settlement, should have been permitted to intervene in the court of appeals to oppose vacation of the judgment. *See Izumi*, *supra*, 510 U.S. at 30-34; *see also id.* at 34-36, 40-41 (dissenting opinion of Justices Stevens and Blackmun).

The following year, this Court rendered its ruling in *U.S. Bancorp*, *supra*. In that decision, the Court concluded that in light of "the benefits that flow to litigants and the public from the resolution of legal questions," parties who settle after the

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likely to depend more on their finances than on legal merit is to be condemned, a system in which wealthy litigants can use the process simply as a nonbinding gambling procedure is equally abhorrent."); Ann M. Ghazarians, Note, *The Impact of Collateral Estoppel on Postjudgment Settlements*, 15 Sw. U. L. Rev. 343, 353 (1985) ("When a party decides to litigate, risking a possible adverse judgment, and loses, that party should not be allowed to avoid the effect of collateral estoppel on the judgment merely by entering into a settlement. That party must now bear the consequences of taking that risk."); Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned upon Vacatur or Reversal of Judgments*, 50 Wash. & Lee L. Rev. 1229, 1263 (1993) ("[A]llowing a party to vacate trial court decisions when a party possesses a discernible motive to either shape precedent or avoid the preclusive effects of a decision casts considerable doubt on the legitimacy of the judicial system. Granting . . . vacatur under such circumstances amounts to endorsement of manipulation of the legal process."); William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 Yale L.J. 860, 867 (1987) ("Circumventing preclusion by vacating existing judgments threatens the public interests in finality of judgments, judicial economy, legitimacy of the legal system, and consistency.").

entry of judgment have to meet a demanding test before that judgment may be vacated. 115 S. Ct. at 393. Declining to vacate a court of appeals judgment at the request of the petitioner after the case was settled during the pendency of this Court's review, the Court unanimously rejected the notion that a courtroom may properly be used as a place to "roll the dice rather than settle . . . if, but only if, an unfavorable outcome can be washed away by settlement-related vacatur." *Id.*

When litigations are settled "after appeal is filed or certiorari sought," the Court determined, the "extraordinary remedy of vacatur" is appropriate only if the parties seeking it can show "exceptional circumstances." *Id.* at 388-89, 392-93. Those circumstances, the Court emphasized, "do not include the mere fact that the settlement agreement provides for vacatur." *Id.* at 393. Because the question of whether to vacate the judgment in the *U.S. Bancorp* case arose directly in this Court, and because no third party sought to be heard, there was no basis for the Court even to consider the intervention issue that had led to the dismissal of the writ in *Izumi*.

This case presents that critical question directly. It is a question that only two members of this Court have addressed to date. In their dissenting opinion from the dismissal of the writ in *Izumi*, Justices Stevens and Blackmun concluded that "if vacation should ever be denied because of the potential impact on third party interests, it was error to deny intervention in this case." 510 U.S. at 36.

The same is true here. BFC and Levan were found liable in a class action for securities fraud for falsely representing that a proposal made by them to their limited partners was fair when they knew it was unfair. As to the separate libel suit commenced by BFC and Levan against ABC, the court of appeals acknowledged that "unless vacated, the jury verdict and judgment in the class action will preclude [plaintiffs'] libel claim against ABC." App. 11a. But the court of appeals' decision barring ABC from intervening to oppose the vacation of the judgment muted the only voice that sought to persuade

the district court to abide by the principles that were articulated by this Court in *U.S. Bancorp*.[9]

Thus, the issue of whether intervention should have been permitted is not only important procedurally but has special substantive bite. As occurred here, settling parties frequently seek vacation of judgments that the losers find inconvenient in return for the payment of much or all of those judgments. The very routineness of that practice undoubtedly contributed to this Court's decision to grant a writ of *certiorari* in *Izumi* and to deny vacation of the judgment in *U.S. Bancorp*. If the Eleventh Circuit's ruling on intervention is not reviewed by this Court, vacation will not only occur in this case, but will routinely occur in cases arising in circuits which hold the same restrictive views on intervention. And such vacation will routinely be treated—as it was here—as unreviewable on the merits because the only entity with an interest in opposing the effort of losing defendants to buy off distasteful precedents will not be permitted to be heard.[10]

Here, the court of appeals affirmed the denial of ABC's motion to intervene, notwithstanding the court's acknowledgment that "without intervention" ABC "will have no way to preserve the preclusive effect of the jury verdict and judgment." App. 11a. Without analysis, the Court dismissed the

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[9] That *U.S. Bancorp* itself was decided two months after the *Purcell* verdict and judgment were vacated does not limit its applicability to this case. As the Court itself stated in *U.S. Bancorp*, the decision did not create new law but rather set forth "principles that have always been implicit in our treatment of moot cases." 115 S. Ct. at 391. In addition, it is well established that "a controlling interpretation of federal law . . . must be given full retroactive effect in all cases still open on direct review." *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

[10] It should come as no surprise that counsel who have settled and agreed to seek vacatur of outstanding judgments have sometimes treated *U.S. Bancorp* as an authority to be "conspicuously uncited." *See Stolz* v. *American International Life Assurance Co.*, 922 F. Supp. 435, 435-36 (W.D. Wash. 1996).

views of Justices Stevens and Blackmun as "not binding precedent" and distinguished the Ninth Circuit case relied upon in their opinion dissenting from dismissal of the writ in *Izumi*.[11] App. 8a-9a. Because parties are entitled "to settle a case without the interference of interlopers," the court of appeals said, the decision denying ABC intervention as of right was consistent with "public policy values." App. 9a.

But the proposition that ABC, with victory concededly at hand in the libel suit against it if the securities fraud judgment against BFC and Levan were not vacated, is an "interloper" because it is for the parties alone to determine, as part of a stipulated settlement, whether a judgment should be vacated, is precisely what *U.S. Bancorp* rejects. The desire of parties to settle after the entry of judgment in return for the vacation of a judgment, this Court held, will *not* in the ordinary course be controlling as against the benefits to society of already-litigated judgments. If intervention is not permitted, however, no one will be heard to seek to give meaning to this Court's ruling in *U.S. Bancorp*.

The Division Among the Circuits

The failure of the Eleventh Circuit even to touch on the implications of *U.S. Bancorp* in considering the intervention issue in this case was bottomed on its extremely restrictive reading of Federal Rule of Civil Procedure 24(a)(2)'s requirement that an intervenor of right have "an interest relating to the property or transaction which is the subject of the action."[12] According to the court, the "interest" required by

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[11] That case was *National Union Fire Insurance Co.* v. *Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989), in which third parties intervened at both the district court and court of appeals levels in order to preserve the preclusive effect of a judgment which the settling parties proposed be vacated. *See Izumi, supra*, 510 U.S. at 36 n.4.

[12] The text of Rule 24(a) is set out in the Appendix hereto at 44a. Subsection (a)(2) requires the grant of intervention as of right when

that subsection is a "direct, substantial, legally protectable interest in the proceedings," something amounting to the status of "at least a real party in interest in the transaction which is the subject of the proceeding." App. 7a.[13] Similarly restrictive views have been articulated by Courts of Appeals for the Third, Fifth and Eighth Circuits. *See, e.g., Mountain Top Condominium Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) (proposed intervenors must be "real parties in interest"); *Piambino* v. *Bailey*, 610 F.2d 1306, 1321 (5th Cir.) (the "real party in interest" requirement

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the motion is "timely," the "applicant claims an interest relating to the property or transaction which is the subject of the action," the claimed interest is not already "adequately represented by existing parties," and "the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." The court of appeals here raised no issue with respect to any element of Rule 24(a)(2) other than the "interest" requirement.

Prior to 1966, Rule 24 required an intervenor as of right to show that, in its absence, it would be adversely affected by the distribution or disposition of property involved in the action and would be "bound by the judgment." *See* Adv. Comm. Notes to 1966 Amendment. This formulation of the Rule was, the amendment drafters noted, "unduly restricted." Under the new Rule, they explained, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of." *Id.* There is surely no doubt that here ABC is "substantially affected" by the loss of the preclusive impact of the *Purcell* verdict and judgment.

[13] The Eleventh and Fifth Circuits have drawn a parallel between the interest needed to support intervention under Rule 24(a)(2) and that needed to bring the underlying action under Rule 17(a). Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 Ariz. St. L.J. 853, 916 & n.226 (1989) (collecting cases). Both jurisdictions also tie Rule 24 to Rule 19. *See Moore* v. *Comfed Savings Bank*, 908 F.2d 834, 839 n.1 (11th Cir. 1990) ("[T]he standard for intervention as of right is the same as that of required joinder."); *Martin* v. *Travelers Indemnity Co.*, 450 F.2d 542, 554 (5th Cir. 1971) ("The considerations of judicial efficiency which underlie Rule 19 must also inspire our interpretations of Rule 24.").

applies to intervenors as well as plaintiffs), *cert. denied*, 449 U.S. 1011 (1980); *Solien* v. *Misc. Drivers and Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir.) ("[i]ntervention as of right presupposes that the applicant has a right to maintain a claim for the relief sought" in the underlying action), *cert. denied*, 403 U.S. 905 (1971).

These views conflict directly with those of the D.C. and Ninth Circuits, which have explicitly rejected the proposition that Rule 24(a) requires "a specific legal or equitable interest" in the underlying property or transaction. *See, e.g., County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *Nuesse* v. *Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). These courts regard the "interest" requirement to be, in the words of Judge Levanthal in *Nuesse*, "primarily a practical guide to disposing of lawsuits by involving as many concerned persons as is compatible with efficiency and due process." 385 F.2d at 700. *See also Smuck* v. *Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*en banc*). The Second Circuit, too, has espoused a far more flexible application of Rule 24(a) than the Eleventh Circuit, noting that the amendments made to the Rule in 1966

> focused on abandoning formalistic restrictions in favor of "practical considerations" to allow courts to reach pragmatic solutions to intervention problems. . . . As amended, Rule 24(a)(2) is a nontechnical directive to courts that provides the flexibility necessary "to cover the multitude of possible intervention situations" . . . and that requires consideration of all the competing and relevant interests raised by an application for intervention . . . .

United States v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (citations omitted). *See generally Conservation Law Foundation, Inc.* v. *Mosbacher*, 966 F.2d 39, 41-42 (1st Cir. 1992) (analyzing split on the meaning of Rule 24(a)(2)'s interest requirement as dividing the Second,

Sixth, Tenth and D.C. Circuits, on the one hand, and the Fifth, Seventh, Eleventh and Federal Circuits on the other).[14]

This Court has spoken twice to the issue of the interest required for intervention as of right but has not definitively resolved questions such as those at issue here. In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Court broadly construed the term "interest," allowing intervenors to contest the terms of an antitrust settlement where both private and public interests were assertedly threatened by the settlement. *Id.* at 134-36. In *Donaldson* v. *United States*, 400 U.S. 517 (1971), in the course of rejecting a taxpayer's bid to intervene in an IRS summary proceeding, this Court stated that the interest contemplated by Rule 24(a)(2) "is obviously . . . a significantly protectable interest." *Id.* at 531. A number of lower courts have noted, however, that these cases do not provide authoritative guidance with respect to the nature of the interest needed for intervention as of right. *See, e.g., Meyer Goldberg, Inc.* v. *Goldberg*, 717 F.2d 290, 292 (6th Cir. 1983); *Meridian Homes Corp.* v. *Nicholas W. Prassas & Co.*, 683 F.2d 201, 203-04

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[14] The stark conflict between the circuits has been frequently remarked upon by scholars. *See* 7C Charles A. Wright *et al.*, *Federal Practice and Procedure*, § 1908 at 263 (2d ed. 1986 & Supp. 1996) (there has been "[no] clear definition, either from the Supreme Court or from the lower courts, of the nature of the 'interest' " needed by an intervenor of right); Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 434 (1991) ("Circuit and district judges have exhibited great difficulty defining interest with sufficient clarity, despite the thousands of opportunities available to them."); *see also* Greenbaum, *supra*, 21 Ariz. St. L.J. at 936-37 & nn.331-338 (detailing the confusion about whether some circuits have aligned themselves on the "narrow" or the "liberal" side of the split and noting that the labels which courts typically use to describe the interest required by Rule 24(a)(2) have resulted in "a linguistic morass"); Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227, 251 & nn.151-57 (1990) (identifying six distinct judicial formulations of the interest test); Tobias, *supra*, 1991 Wis. L. Rev. at 434 n.132 (concluding that Professor Bandes "may have underestimated the number of formulations and the degree of inconsistency").

(7th Cir. 1982); *Blake* v. *Pallan*, 554 F.2d 947, 952 (9th Cir. 1977).

Some courts have taken the position that the "significantly protectable" language in *Donaldson* was intended to limit the apparent liberality of *Cascade*. *See, e.g., American National Bank & Trust Co.* v. *City of Chicago*, 865 F.2d 144, 146 & n.2 (7th Cir. 1989); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 466 n.28 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984). Others differ, resting their more expansive construction of the interest requirement at least in part on *Cascade*. *See, e.g., Feller* v. *Brock*, 802 F.2d 722, 730 (4th Cir. 1986) (citing *Cascade* for the proposition that impact on ability to compete economically is sufficient to warrant intervention of right); *Natural Resources Defense Council, Inc.* v. *United States Nuclear Energy Comm'n*, 578 F.2d 1341, 1344 (10th Cir. 1978) (stating that *Cascade* "held that the interest claimed by the applicant in intervention did not have to be a direct interest in the property or transaction at issue provided it was an interest that would be impaired by the outcome"); *Blake*, *supra*, 554 F.2d at 952 (*Cascade* "rejected the notion that Rule 24(a)(2) requires [that the intervenor have] 'a specific legal or equitable interest' ").

If anything, the circuit division as to when a party has an interest sufficient to permit intervention as of right is exacerbated when the asserted interest lies in the perpetuation of a judgment or decision. In this case, the Eleventh Circuit squarely held that even the concededly dispositive collateral estoppel impact of a judgment does not suffice to permit intervention to protect that interest. That ruling is not only at odds with the Ninth Circuit's decision allowing intervention for just such a purpose in *National Union*, *supra*, a case referred to in the dissenting opinion of Justices Stevens and Blackmun in *Izumi*, but with rulings in other circuits permitting intervention in cases in which third parties professed concern about the potential *stare decisis* impact upon their own cases. *See Natural Resources Defense Council*, *supra*,

578 F.2d at 1345 (reversing denial of intervention to avoid *stare decisis* impact of case: "[t]he court may consider any significant legal effect on the applicant's interest and it is not restricted to a rigid res judicata test"); *Brody* v. *Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992) (same); *Feller*, *supra*, 802 F.2d at 730 (permitting intervention when *stare decisis* effect of litigation would substantially impair ability of proposed intervenor to rely on outstanding injunction); *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) ("We join other circuits in holding that the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join in an action."). At the very least, the substantiality of a third party's interest in protecting the preclusive effect of a judgment surely equals a third party's interest in the *stare decisis* effect of a decision.[15]

The Rejection of U.S. Bancorp

That the court of appeals here was unpersuaded by the significance of ABC's interests—despite its acknowledgment that, but for the vacatur, the *Purcell* judgment would estop the *Levan* action entirely—reflects more than a crabbed approach to intervention which conflicts with rulings in other circuits. It displays, as well, a rejection of the core principles articulated in *U.S. Bancorp* itself.[16]

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[15] *See, e.g., Nuesse, supra*, 385 F.2d at 702 (finding sufficient potential impairment to justify intervention as of right even though movant "would not be precluded by res judicata from relitigating this question if an unfavorable answer is rendered in his absence"; even under the considerably more restrictive pre-1966 Rule 24, "the opportunity to raise the same issue in another forum was no bar to intervention as of right").

[16] It is also wholly inconsistent with the principles articulated in this Court's landmark ruling in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). If, as this Court ruled, the offensive use of non-mutual collateral estoppel is to be encouraged, the Eleventh Circuit's ruling here deprives the very parties benefitted by *Parklane* of an opportunity to urge

In *U.S. Bancorp*, this Court unanimously held that, under "principles that have always been implicit in our treatment of moot cases," courts may not routinely vacate decisions pursuant to settlement agreements between the parties. 115 S. Ct. at 391. Labeling vacatur an "extraordinary remedy" that may be granted pursuant to settlement only in "exceptional circumstances," *id.* at 392-93, this Court firmly and unequivocally rejected the very concept that the court of appeals articulated here: that the value of settlement necessarily outweighs the interest of "interlopers" such as ABC, and of society as a whole, in the preservation of already-litigated judgments.

Where a case becomes moot as a result of settlement or other voluntary act of the losing party, the Court continued, "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 392. "As always when federal courts contemplate equitable relief," the Court explained,

> our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. __, __, 114 S. Ct. 425, 428, 126 L. Ed.2d 396 (1993) (STEVENS, J., dissenting [to dismissal of certiorari]). Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral

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that otherwise preclusive verdicts and judgments should not simply be erased when the litigants in the first action are faced with the unpleasant collateral consequences of those verdicts and judgments.

> attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.

Id. at 392. The Court further rejected the view, expressed in some opinions, that "since district-court judgments are subject to review as of right," vacatur motions directed at those judgments "should be more freely granted." *Id.* at 393.

The choice presented to this Court in *U.S. Bancorp* was clear: to protect the public judgments of the courts from litigants who wish to buy and sell them as an element of settlement or to permit litigants to decide for themselves whether judgments in their cases will survive settlement. Choosing the former course, this Court ruled that judgments should not be vacated absent "exceptional circumstances" and made explicit "that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur—which neither diminishes the voluntariness of abandonment of review nor alters any of the policy considerations we have discussed." *Id.*

In this case, it is undisputed that the *Purcell* jury found BFC and Levan liable for securities fraud and awarded the plaintiff class $8 million in damages; that the *Purcell* court entered judgment on that verdict and denied BFC's and Levan's Rule 50 and Rule 59 motions for judgment n.o.v. or a new trial because it found the verdict to be sufficiently supported by the evidence; that BFC and Levan offered the plaintiff class the entire $8 million awarded by the jury in a settlement on condition that the class agree to a stipulated judgment erasing the prior verdict and judgment and declaring that the verdict and judgment would have no preclusive effect; that BFC and Levan could have but chose not to finalize their case for appeal; that no law and no fact changed between the date the prior judgment was entered and the date the vacatur occurred (except the magistrate's recommendation in *Levan* that summary judgment be granted and the *Purcell*

parties' own decision to settle); and that through the stipulation of settlement and the consent judgment embodying it, BFC and Levan "*voluntarily* forfeited [their] legal remedy by the ordinary processes of appeal." *U.S. Bancorp*, 115 S. Ct. at 392 (emphasis added). These facts are the very opposite of "exceptional circumstances." They amount, in the end, to nothing more or less than that "the settlement agreement provides for vacatur"—precisely what this Court concluded does *not* constitute "exceptional circumstances." *Id.* at 393.[17]

Despite the clarity of this Court's rationale in *U.S. Bancorp*, that rationale was discarded by the Eleventh Circuit.[18] Both in its failure even to address *U.S. Bancorp* and in its decision to deny "interlopers" such as ABC the opportunity to intervene to seek to preserve an outstanding judgment, the court of appeals subordinated the value of assuring that judgments are not bought and sold by litigants to that of encouraging settlement. This is the very calculus which *U.S. Bancorp* considered and rejected.[19]

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[17] As this Court stated in *U.S. Bancorp*, a district court may vacate a judgment even after settlement pursuant to Federal Rule of Civil Procedure 60(b). 115 S. Ct. at 393. The parties below did not pursue their vacatur through a Rule 60(b) motion. Nor could they have, as they are unable to demonstrate a ground for relief under any of the provisions of that Rule. Even the broad "catch-all" of subsection 60(b)(6) of the Rule—allowing invocation of "any other reason justifying relief from the operation of the judgment"—requires that the moving party show "exceptional circumstances," *Pioneer Investment Services Co.* v. *Brunswick Assocs. Limited Partnership*, 507 U.S. 380, 393 (1993), precisely what *U.S. Bancorp* ruled is the necessary predicate for vacatur of a voluntarily mooted judgment.

[18] Yet, as Justice Scalia recently emphasized, this Court expects lower courts to adhere not only to the results but also to the " '*rationale* upon which the Court based the results of its earlier decisions.' " *United States* v. *Virginia*, 64 U.S.L.W. 4638, 4661 (U.S. June 26, 1996) (Scalia, J., dissenting) (emphasis original) (quoting *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1128-29 (1996)).

[19] The Eleventh Circuit's resistance to enforcing this Court's ruling in *U.S. Bancorp* may be shared by the First Circuit as well. In *Motta*

Only by making plain that third parties with the kind of direct interest in the preclusive impact of a judgment which ABC has here—and which Izumi had in the *Izumi* case—can *U.S. Bancorp ever* be enforced. This case thus presents an important opportunity for this Court to assure that the principles of *U.S. Bancorp* will not be ignored, to resolve a continuing conflict among the circuits, and to repudiate as fundamentally inconsistent with the purport of Rule 24 the restrictive approach to intervention adopted by the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 23, 1996

Respectfully submitted,

Floyd Abrams
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

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v. *District Director of INS*, 61 F.3d 117 (1st Cir. 1995), the court of appeals vacated a district court judgment that was mooted by settlement while appeal was pending, finding that "exceptional circumstances" existed under *U.S. Bancorp* because (1) the settlement effort had been initiated by the appeals court; (2) the INS, the loser below, was a "repeat player" that had an interest in eradicating the adverse precedent; (3) the alien who won below was relieved of the risks of appeal; and (4) the INS would not settle without the vacatur. *Id.* at 118-19. The *Motta* analysis appears directly contrary to this Court's ruling in *U.S. Bancorp*.

Of Counsel:

Susan Buckley
Anne B. Carroll
Cahill Gordon & Reindel
New York, New York

Raymond V. Miller
Kaufman Miller Dickstein
& Grunspan, P.A.
Miami, Florida

Alan N. Braverman
Stephanie S. Abrutyn
American Broadcasting Companies, Inc.
New York, New York

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

June 25, 1996

Nos. 94-4831, 94-5079

JOHN D. PURCELL, *et al.*,

Plaintiffs-Appellees,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation, *et al.*,

Defendants-Appellees.

WILLIAM A. SMITH, *et al.*,

Plaintiffs-Appellees,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation, *et al.*,

Defendants-Appellees.

TIMOTHY J. CHELLING,

Plaintiff-Appellee,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation, *et al.*,

Defendants-Appellees.

AMERICAN BROADCASTING COMPANIES, INC.,
WILLIAM H. WILSON,

Appellants.

Appeals from the United States District Court for the Southern District of Florida.

Before CARNES and BARKETT, *Circuit Judges*, and DYER, *Senior Circuit Judge*.

CARNES, *Circuit Judge*:

This appeal arises from the district court's denial of American Broadcasting Companies, Inc. ("ABC")'s motion to intervene and from the district court's entry of a stipulated judgment vacating the jury verdict in a class action in which ABC sought to intervene. ABC argues that due to the potential collateral estoppel effect that the jury verdict could have in a separate libel action between it and certain defendants in the class action, ABC should be permitted to intervene to argue against the vacatur of that verdict. For the reasons discussed below, we hold that ABC lacks sufficient interest in the class action to permit intervention as of right, and that the district court did not abuse its discretion in denying ABC's motion for permissive intervention.

I. FACTS AND PROCEDURAL HISTORY

In 1989, the plaintiffs, limited partners in various real estate limited partnerships, filed three class actions in the United States District Court for the Southern District of Florida against, among others, fellow limited partners Alan B. Levan and BankAtlantic Financial Corporation ("BFC"). The actions were thereafter consolidated into one class action, which involved exchange transactions proposed by Levan and BFC in which the plaintiffs' interests in the limited partnerships were exchanged for twenty-year, unsecured, BFC sub-

ordinated debentures. The plaintiffs alleged that the exchange transactions violated federal securities laws, and sought damages and rescission of the debentures.

In November 1991, ABC aired a story on the television program "20/20" about the BFC exchange transactions. The program stated that Levan and BFC knew the transactions were unfair to the plaintiffs, but that they endorsed them anyway. In February 1992, Levan and BFC filed a libel action in the United States District Court for the Southern District of Florida against ABC.

A jury trial was held in the class action suit in December 1992, which resulted in a verdict in favor of the plaintiffs and an award of $8 million in damages. In the course of reaching its verdict, the jury was asked to answer the following special interrogatories:

> 1. Have the plaintiffs proved, by the greater weight of the evidence, that the exchange transaction proposed by BankAtlantic Financial Corporation was "unfair" to the limited partners . . . ?
>
> 2. Have the plaintiffs proved, by the greater weight of the evidence, that the managing general partners, or the company or Alan Levan falsely stated in the prospectus and the transmittal letter that they believed that the exchange transaction was "fair" when they knowingly believed otherwise?

The jury answered both questions in the affirmative. The district court entered final judgment on the verdict on December 18, 1992. At that time, the plaintiffs' claim for equitable rescission had not yet been resolved.

In January 1993, Levan and BFC filed motions for remittitur and for judgment notwithstanding the verdict or for a new trial, which the district court denied. After motions related to prejudgment interest were resolved, Levan and BFC filed an appeal in July 1993. This Court dismissed the appeal in February 1994, holding that the district court's judgment

was not final because it had not yet disposed of the plaintiffs' claim for equitable rescission.

In February 1993, ABC moved for summary judgment in the libel lawsuit, arguing that the collateral estoppel effect of the December 1992 jury verdict in the class action case precluded a judgment against ABC in the libel lawsuit. The magistrate judge in the libel lawsuit recommended that summary judgment be granted in favor of ABC because the jury's verdict in the class action case preclusively established the substantial truth of the "20/20" broadcast. However, the district court in the libel lawsuit stayed the proceedings until the equitable rescission claim could be disposed of in the class action case.

After the magistrate judge recommended summary judgment for ABC in the libel lawsuit, Levan and BFC began working on a settlement with the plaintiffs in the class action case. They reached an agreement in which the defendants would pay the plaintiffs the full amount of the damages that the jury had awarded them, plus interest,[1] in exchange for a stipulated motion to vacate the jury verdict and resulting judgment. Levan informed the district court in the libel lawsuit of the impending settlement in the class action, with the result that the district court rejected the magistrate's recommendation of summary judgment in favor of ABC, and referred the case back to the magistrate for further consideration in light of the impending class action settlement.

Learning of the class action settlement agreement, ABC was understandably unhappy about the provision for vacatur of the jury verdict and judgment, upon which it was relying in the libel lawsuit. ABC moved to intervene in the class action

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[1] The settlement agreement provided that $4 million would be paid into an escrow account by the date of the settlement agreement approval hearing before the district court, and the other $4 million would be paid into the escrow account within thirty months of the execution of the settlement agreement. The agreement further provided that Levan and BFC would pay an annual interest rate of 7% on the second $4 million installment, to be calculated from the date of the execution of the settlement agreement.

for the purpose of opposing the vacatur of the jury verdict and judgment. For obvious reasons, Levan and BFC, two defendants in the class action, opposed ABC's motion to intervene. The plaintiffs in the class action also opposed it, because their certain and relatively prompt receipt of the $8 million payment, plus interest, through the settlement agreement was expressly conditioned upon the vacatur. The district court denied ABC's motion to intervene. After a hearing on the proposed settlement, the district court approved the class action settlement agreement and entered a final judgment vacating the jury verdict and the final judgment entered thereon.

Thereafter, in April 1995, the magistrate judge in the libel lawsuit recommended that ABC's motion for summary judgment be denied in light of the vacatur of the jury verdict in the class action.

This is ABC's appeal from the denial of its motion to intervene and from the district court's final judgment approving the settlement and vacating the verdict and judgment in the class action case.[2] The plaintiffs have moved in this Court to dismiss this appeal arguing that the appeal is moot because the settlement extinguished the "case or controversy" that was before the court, and that ABC lacks standing to challenge the settlement agreement. We ordered that the motion to dismiss be carried with the case, and we now deny it.[3]

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[2] ABC filed two notices of appeal. The first notice was filed within thirty days of the district court's denial of its motion to intervene as of right. The denial of a motion to intervene as of right is a final appealable order, *e.g.*, *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1476 (11th Cir. 1993), and thus, even though the class action had not yet resulted in a final judgment, ABC's first notice of appeal was properly filed. After the district court entered final judgment on the settlement, ABC filed a second notice of appeal within thirty days with respect to its motion for permissive intervention, and with respect to the settlement itself. ABC then filed a motion to consolidate the two appeals, which this Court granted.

[3] ABC has standing to appeal the district court's denial of its motion to intervene. If we conclude that ABC is entitled to intervene as of right, then ABC has standing as a party to appeal the district court's judgment based on the approved settlement agreement, and we would

II. DISCUSSION

Before the class action parties began negotiating their settlement agreement, the magistrate judge in the libel lawsuit had recommended summary judgment in favor of ABC because the class action jury verdict preclusively established the substantial truth of the "20/20" broadcast. ABC argues that this recommendation gave it a sufficient interest in the settlement agreement to entitle it to intervene in the class action. On the merits, ABC argues that the district court's approval of the settlement agreement providing for the vacatur of the jury verdict was an abuse of discretion because that agreement was designed to manipulate the judicial system, and the Supreme Court's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994), disapproves of such settlement agreements.

We do not reach ABC's argument regarding the propriety of the district court's approval of the settlement agreement, because, as we explain below, we are persuaded that the district court properly denied ABC's motion to intervene. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989) ("If we find that the district court's disposition of the motions to intervene was correct, then our jurisdiction evaporates. . . ." (citation and quotation marks omitted)).

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review that judgment. If we determined that the district court abused its discretion in approving the settlement agreement, then we would reverse the judgment, which included vacatur of the jury verdict, and ABC would be granted the relief it seeks. Because we can potentially grant ABC effective relief, this appeal is not moot. *See, e.g., In re Club Assoc.*, 956 F.2d 1065, 1069 (11th Cir. 1992) ("Central to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief.").

A. Intervention as of Right

In this circuit, a movant must establish the following requirements to intervene as of right under Federal Rule of Civil Procedure 24(a)(2):

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles, 865 F.2d at 1213. We review the district court's denial of ABC's motion to intervene as of right *de novo*. *See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 214-15 (11th Cir. 1993). "Once a party establishes all the prerequisites to intervention, the district court has no discretion to deny the motion." *United States v. State of Ga.*, 19 F.3d 1388, 1393 (11th Cir. 1994).

The plaintiffs and the defendants in the class action focus primarily on ABC's failure to establish the second requirement for intervention—that ABC have "an interest relating to the property or transaction which is the subject of the action." *Chiles*, 865 F.2d at 1213. "In determining sufficiency of interest, this circuit requires that the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. This interest has also been described as a direct, substantial, legally protectable interest in the proceedings." *Worlds v. Department of Health and Rehabilitative Serv.*, 929 F.2d 591, 594 (11th Cir. 1991) (per curiam) (footnotes, citations, and quotation marks omitted).[4]

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[4] Although some courts have held that the requirements for intervention are equivalent to the requirements for Article III standing, *e.g.*, *Southern Christian Leadership Conference, (SCLC) v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984), this Court has held that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit." *Chiles*, 865 F.2d at 1213.

The transactions that were the subject of the class action proceeding are the debenture exchange transactions. ABC admits that it is not a real party in interest as to those exchange transactions. Instead, ABC argues that preventing the vacatur of a judgment that has been deemed by a magistrate judge to be preclusive in another lawsuit in which it is a party is sufficient for ABC to meet the interest requirement for intervening as of right. ABC has not cited any binding authority to support its position, and we are not convinced by the authority ABC has cited: a Ninth Circuit case, *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989), and Justice Stevens's dissenting opinion from the Supreme Court's dismissal of certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, ____, 114 S.Ct. 425, 429, 126 L.Ed.2d 396 (1993).

In *National Union*, the issue was whether the district court abused its discretion in denying a motion to vacate its judgment as part of a settlement agreement. Intervention was not an issue on appeal. The district court in that case had permitted third parties to intervene in an action between an insurance company and an insured for the limited purpose of objecting to the vacatur of the court's judgment as part of a settlement agreement. 891 F.2d at 764. It is not apparent from the opinion in *National Union* whether the intervenors had been allowed to intervene as of right or permissively. What is apparent is that the intervenors in *National Union* had a more direct interest in the transaction that was the subject of that case, because those intervenors were defending a separate lawsuit brought by the *National Union* plaintiffs arising out of the very same insurance contract transaction at issue in that case. *Id.* at 763.

This case is distinguishable from *National Union*, because the libel lawsuit ABC is defending against Levan and BFC did not arise out of the same transactions at issue in this class action. Instead, the libel lawsuit arose out of a separate incident—a "20/20" broadcast—that reported about the transactions at issue in the class action. In other words, the inter-

venors in *National Union* were real parties in interest as to the transactions that were the subject of that case; by contrast, ABC is not a real party in interest as to the transactions that are the subject of the class action lawsuit in this case. Therefore, even if *National Union* were binding precedent, it does not support the proposition that ABC has a sufficient interest for intervention as of right in this case.

As for ABC's reliance on Justice Stevens's dissent in *Izumi*, a dissenting Supreme Court opinion is not binding precedent. *E.g., United States v. Goodrich*, 871 F.2d 1011, 1013 (11th Cir. 1989). Justice Stevens's opinion dissenting from the Court's order dismissing the writ of certiorari as improvidently granted in *Izumi* does not tell us how a majority of the Court would decide this case.

We conclude that, measured against the Rule 24 requirement that it be "a direct, substantial, legally protectable interest," *Worlds*, 929 F.2d at 594, ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right. Broadening the right of intervention to cover the circumstances of this case would not only be unprecedented, it would also run counter to the public policy values that are furthered by permitting parties to settle a case without the interference of interlopers. The district court did not err in denying ABC's motion to intervene as of right.

B. Permissive Intervention

This Court has previously explained that:

> "If there is no right to intervene under Rule 24(a), it is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention."

Worlds, 929 F.2d at 595 (quoting 7C Charles A. Wright, et al., *Federal Practice and Procedure* § 1913, at 376-77 (2d ed. 1986) (footnotes omitted)). "[O]ur task is not to determine whether the factors of Rule 24(b) were present, but is rather to determine whether the trial court committed a clear abuse of discretion in denying the motion." *Id.* (citations and quotation marks omitted).

We must affirm under the abuse of discretion standard "unless we at least determine that the district court has made a clear error of judgment, or has applied an incorrect legal standard." *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (citations and quotations marks omitted).

> By definition, . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review. As we have stated previously, the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.

Macklin v. Singletary, 24 F.3d 1307, 1311 (11th Cir. 1994) (citations and quotation marks omitted), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995).

ABC's arguments related to permissive intervention are primarily aimed at establishing that it met both requirements for permissive intervention: (1) the application to intervene was timely; and (2) the intervenor's claim or defense and the main action have a question of law or fact in common. *E.g.*, *Chiles*, 865 F.2d at 1213. However, that is not really the focus of our inquiry, because we do not address the matter in the first instance. As a reviewing court, we are concerned only with "clear error[s] of judgment" that the district court may have made, or with "incorrect legal standard[s]" that it may have applied. *SunAmerica*, 77 F.3d at 1333. ABC has not argued

that the district court did either, except to the extent that it contends that the parties in the class action case could not be prejudiced by allowing ABC's intervention, and that ABC must be permitted to intervene because it is unable to challenge by any other means the vacatur's impact on the preclusive effect of the class action jury verdict in the libel lawsuit.

ABC's argument that its intervention will not prejudice the parties in the class action lawsuit is premised upon its assertion that preventing the parties in that action from vacating the jury verdict and judgment will not prejudice them. Of course, that assertion is woefully unconvincing insofar as it concerns Levan and BFC, whose interest in the vacatur is the converse of ABC's interest. Permitting ABC to intervene for the purpose of blocking the vacatur would substantially prejudice Levan and BFC, because unless vacated, the jury verdict and judgment in the class action will preclude their libel claim against ABC. Moreover, permitting ABC to intervene in the class action would also substantially prejudice the plaintiffs, because the result ABC seeks would effectively vitiate the settlement agreement through which the plaintiffs are receiving payments from the damage award.

As for ABC's assertion that without intervention it will have no way to preserve the preclusive effect of the jury verdict and judgment in the class action, that is true. But a nonparty is not necessarily entitled to preserve the beneficial effects of a jury verdict and judgment, however much the nonparty may cherish those effects. Moreover, ABC will have its day in court. In the trial of the libel lawsuit, ABC will have an opportunity to establish in the old-fashioned way the defense that it sought to preclusively establish with the class action jury verdict and judgment. Under these circumstances, it was certainly not a clear abuse of discretion for the district court to deny ABC's motion for permissive intervention.

III. CONCLUSION

The plaintiffs' motion to dismiss this appeal as moot is DENIED. The district court's denial of ABC's motion to intervene, both as of right and permissively, is AFFIRMED. The remaining issues raised in this appeal are DISMISSED for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
AT WEST PALM BEACH

Filed September 12, 1994

No.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife; *et al.*,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION
a Florida corporation; *et al.*,

Defendants.

No.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife, *et al.*,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,

Defendants.

No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,

Defendants.

FINAL JUDGMENT APPROVING SETTLEMENT AND ORDER OF DISMISSAL

THIS MATTER came before the Court on the joint motion of the Class Representatives, on behalf of the Exchange I Class Members, as those terms are defined in the Stipulation Of Settlement, dated as of June 8, 1994, (the "Stipulation"), and on behalf of BankAtlantic Financial Corporation, I.R.E. Advisors Series 21 Corp., I.R.E. Advisors Series 23 Corp., I.R.E. Advisors Series 24 Corp. and Alan B. Levan, for approval of a settlement in these actions, as embodied in the Stipulation. The Court, having considered all papers filed in connection with said motion and good cause appearing therefore, hereby FINDS AND DETERMINES AS FOLLOWS:

1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs. The court found during the pretrial and trial that the disclosure document distributed to the former limited partners of the three partnerships fully and adequately disclosed the terms of the proposed transaction and the risks of the proposed transaction. The aspects of the proposed transaction that plaintiffs contended at trial to be unfair, were fully and adequately disclosed to the plaintiffs in the disclosure documents. Indeed, these plaintiffs, who each voted against the transaction, did so in large measure because what they read about the transaction in the prospectus persuaded them that it was not in their best interest.

2. The claim asserted under the principles of *Virginia Bankshares v. Sandberg*, 111 S.Ct. 2749 (1991) that, notwithstanding the adequacy of disclosure, defendants' stated opinion of fairness while allegedly believing otherwise was a troublesome one for the court because of the adequacy of risk and conflict disclosure, because the evidence that anyone relied upon that opinion was scanty at best, and because the evidence that BankAtlantic Financial Corporation and Alan B. Levan believed the transaction to be unfair was weak, particularly since BankAtlantic Financial Corporation agreed to

pay more for the former partnership assets than those assets turned out to be worth, albeit over a lengthy time period.

3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. That concern was heightened by the fact that their decision could easily have been influenced by the progression of elderly claimants who did not want twenty year debentures regardless of the fairness of the proposed transaction (As one elderly witness testified, "I don't even buy green bananas any more.") or by the extensive adverse pre-trial publicity. In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.

4. The jury rendered its verdict in the cause on December 17, 1992. The jury found that the debenture exchange transaction was unfair, the defendants knew it was unfair, and the defendants' representation that it was fair was a material misrepresentation. The jury awarded plaintiffs damages totaling eight million dollars. The court entered a judgment on the verdict December 18, 1992.

5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

6. The terms of the settlement of this case are conditioned upon setting aside the verdict of the jury and the final judgment in this cause. This court has no reservation whatsoever in doing so.

7. This Court has jurisdiction over the subject matter and parties to these actions and over all parties to the Stipulation, including all Exchange I Class Members, as defined in the Stipulation.

8. The settlement embodied in the Stipulation is fair, reasonable and adequate to the Exchange I Class Members, as defined in the Stipulation.

9. The notice given to the Exchange I Class Members of the settlement set forth in the Stipulation, as required by this Court's Order Preliminarily Approving Proposed Class Settlement and providing for Notice of Pendency and hearing on Proposed Settlement of Class Action, entered on _____, 1994, was the best notice practicable under the circumstances, including individual notice to the Exchange I Class Members who could be identified through reasonable effort. Said notice provided due and sufficient notice of the proceedings regarding final approval of the settlement, including the terms of the proposed settlement set forth in the Stipulation, to all persons entitled to such notice, and said notice fully satisfied the requirements of due process.

Having considered the foregoing, the presentation of counsel and the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The Stipulation of settlement is hereby ratified and approved by the court.

2. With the exception of those persons identified on Exhibit A to the Stipulation of Settlement, all of whom filed valid and timely requests for exclusion from the class previously certified in this action, the Court hereby dismisses, with prejudice and without costs to any party as against any other, except as provided in the Stipulation, this action and any and all claims, actions, or causes of actions alleged by the Class Representative, individually and on behalf of the Exchange I Class Members, in the above-captioned action against the Settling Defendants.

3. The Exchange I Class Members shall be deemed, subject to Paragraph VI.X. (1) of the Stipulation, conclusively to have released and are hereby permanently barred and enjoined from prosecuting against BankAtlantic Financial Corporation, Alan B. Levan, IRE Advisors Series 21, Corp., IRE Advisors Series 23, Corp., IRE Advisors Series 24, Corp., ("the Settling Defendants"), including, without limitation, his or its respective predecessors and successors, parents, subsidiaries and affiliates and all their present and former partners, principals, officers, directors, employees, agents, attorneys, assigns, representatives, heirs, executors and administrator any and all claims, actions, or causes of action of whatever nature, character or description, whether known, unknown, suspected or unsuspected which were brought against the Settling Defendants in this case or which should have been brought as compulsory claims in this case and which among other things, allege that investors in the Exchange I Partnership were wrongfully deprived of their partnership interests and wrongfully given, in exchange for those interests, BFC Debentures, or which relate to or arise out of the Exchange I Partnerships, the termination thereof, Exchange I itself, or the BFC debentures, including the debt evidenced therein.

4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

5. Without affecting the finality of this judgment, the Court hereby reserves jurisdiction over (a) implementation of this settlement and any award or distribution of the proceeds of the settlement, including interest earned thereon; (b) disposition of the settlement proceeds; (c) any hearing and/or determination on the application of counsel for the Class

Representative for attorneys' fees, costs, interest and expenses in this action; and (d) enforcement and administration of the Stipulation.

DONE AND ORDERED in open Court at West Palm Beach, Florida this 12th day of September, 1994.

/s/ KENNETH L. RYSKAMP
UNITED STATES DISTRICT COURT JUDGE

G:\W-LIT\07826\068\ORDER-1.FJE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed July 15, 1994

Case No. 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,

Defendants.

Case No. 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,

Defendants.

Case No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,

Defendants.

ORDER OF CLARIFYING PREVIOUS ORDER DENYING MOTION TO INTERVENE

THIS CAUSE came before the Court on the Motion of American Broadcasting Companies, Inc. and William H. Willson For Clarification of Order Denying Their Motion to Intervene as Third Party Plaintiffs.

On July 5, 1994, after reviewing all briefing concerning the Motion to Intervene (including the Movants' Reply Brief filed on July 1, 1994), the Court denied Movants' Motion to Intervene. Due to clerical error, the Order contained an incorrect signature date and an incorrect file stamp date. The Court issues this clarifying Order in order to avoid any confusion as to when the Order denying the Motion to Intervene was issued. After careful consideration of the record in this matter, it is hereby:

ORDERED AND ADJUDGED that the Motion of American Broadcasting Companies, Inc. and William H. Willson For Clarification of Order Denying Their Motion to Intervene as Third Party Plaintiffs is GRANTED. The Court's previous Order Denying Motion to Intervene should have indicated that it was signed and filed on July 5, 1994.

DONE AND ORDERED in chambers at the United States District Court, WEST PALM BEACH, Florida, this 15 day of July, 1994.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: RAYMOND MILLER
FLOYD ABRAMS
RAY SIDERIUS
EUGENE STEARNS
J. MICHAEL FITZGERALD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed June 30, 1994

Case No. 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,

Defendants.

Case No. 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,

Defendants.

Case No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,

Defendants.

ORDER DENYING MOTION TO INTERVENE

THIS CAUSE came before the Court on the Motion of American Broadcasting Companies, Inc. and William H. Willson to Intervene as Third Party Plaintiffs. The BAFCO Defendants have filed an Opposition to the Motion to Intervene and a Request for Oral Argument. The Plaintiffs also have filed an Opposition to the Motion to Intervene. After careful consideration of the record in this matter, it is hereby:

ORDERED AND ADJUDGED that the Motion of American Broadcasting Companies, Inc. is DENIED. BAFCO Defendants' Request for Oral Argument is DENIED AS MOOT.

DONE AND ORDERED in chambers at the United States District Court, WEST PALM BEACH, Florida, this 5 day of June, 1994.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: RAYMOND MILLER
FLOYD ABRAMS
RAY SIDERIUS
EUGENE STEARNS
J. MICHAEL FITZGERALD
DAVID POLLACK

[1609] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

Docket Nos. 89-1284-CIV-RYSKAMP
89-1605-CIV-RYSKAMP
89-1850-CIV-RYSKAMP

WEST PALM BEACH, FLORIDA
December 17, 1992 10:45 a.m.

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife, *et al.*,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

TIMOTHY J. CHELLING,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

VOLUME 9
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE KENNETH L. RYSKAMP
and a jury

APPEARANCES:

For the Plaintiffs:	RAY SIDERIUS, ESQ. CHARLES LONERGAN, ESQ. MICHAEL FITZGERALD, ESQ.
For the Defendants:	EUGENE STEARNS, ESQ. JAY SHAPIRO, ESQ.
Court Reporter:	Richard Greenspan, C.S.R. United States Courthouse West Palm Beach, FL 33401

[1635] (Recess)

(4:05 p.m., jury present)

THE COURT: Has the jury arrived at a verdict?

THE FOREMAN: Yes.

THE COURT: Will you give the verdict form to the clerk, please.

THE CLERK: John D. Purcell and Debra A. Purcell v. BankAtlantic Financial Corporation, case numbers 89-1284-Civil-Judge Ryskamp, 89-1605-Civil-Judge Ryskamp and 89-1850-Civil-Judge Ryskamp.

Special verdict.

We, the jury find as follows:

1. Have the plaintiffs proved, by the greater weight of the evidence, that the Exchange Transaction proposed by BankAtlantic Financial Corporation was "unfair" to the limited partners of I.R.E. Series 21, I.R.E. Series 23 and I.R.E. Series 24?

Answer: Yes.

2. Have the plaintiffs proved, by the greater weight of the evidence, that the managing general partners, or the company or Alan Levan falsely stated in the Prospectus and the transmittal letter that they believed that the Exchange transaction was "fair" when they knowingly believed otherwise?

Answer: Yes.

3. Have the plaintiffs proved, by the greater weight **[1636]** of the evidence, that the opinion of fairness was "material" to the decision of a reasonable investor; that is, have plaintiffs proved that the statement of opinion in the context of all of the disclosure in the Prospectus and the transmittal letter would be viewed by a reasonable investor as having significantly altered the total mix of information made available so as to materially effect the investor's decision on the proposal?

Answer: Yes.

4. Have the plaintiffs (former limited partners in I.R.E. Series 21, I.R.E. Series 23 and I.R.E. Series 24 who either voted no or did not vote) suffered any damage caused by the claimed misrepresentation of fairness?

Series 21: Yes.

Series 23: Yes.

Series 24: Yes.

5. What is the amount of damage, if any, which plaintiffs and the members of the class have proved that they have suffered as a consequence of the actions of defendants?

Series 21: $1,442,622.

Series 23: $3,278,689.

Series 24: $3,278,689.

So say we all, dated December 17, 1972, Steven Simon, foreperson.

THE COURT: Members of the jury, I am going to ask the

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed December 16, 1992

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL *et*

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,

Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,

Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,

Defendants.

FINAL JUDGMENT

THIS CAUSE came for trial before the Court for trial by jury on December 7, 1992, concluding on December 17, 1992.

The jury, by special verdict, found in favor of the Plaintiffs in response to all questions. Accordingly, Final Judgment is hereby entered in favor of the Plaintiffs and against the Defendants.

The jury also found that plaintiffs and the members of the class have proved damages in the following amounts:

In case number 89-1850-CIV-RYSKAMP, involving the members of the class who had invested in IRE Series 21—$1,442,622.00;

In case number 89-1605-CIV-RYSKAMP, involving the members of the class who had invested in IRE Series 24—$3,278,689.00;

In case number 89-1284-CIV-RYSKAMP, involving the members of the class who had invested in IRE Series 23—$3,278,689.00. Accordingly, it is also hereby

ORDERED AND ADJUDGED that damages in the amounts specified are awarded to the class members in the above captioned causes, defendants BankAtlantic Financial Corporation, Alan B. Levan, I.R.E. Advisors Series 21, Corp., I.R.E. Advisors Series 23, Corp., and I.R.E. Advisors Series 24, Corp. to be jointly and severally liable.

DONE AND ORDERED in chambers at the United States District Court, West Palm Beach, Florida, this 17th day of December, 1992.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

copies provided:
Ray Siderius
Siderius & Lonergan
Eugene Stearns
Stearns, Weaver, Miller
J. Michael Fitzgerald
Fitzgerald, Portela, & Portuondo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed March 19, 1993

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,
Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,
Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,
Defendants.

ORDER DENYING BAFCO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL

THIS CAUSE came before the Court on the BAFCO Defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The Court having considered the motion, the response, and the relevant portions of the record, including the trial transcript, it is hereby

ORDERED AND ADJUDGED that the BAFCO motion is DENIED both as to Judgment Notwithstanding the Verdict and for a New Trial.

DONE AND ORDERED in chambers this 19th day of March, 1993, at the United States District Court for the Southern District of Florida.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: Eugene Stearns
Raymond Siderius
Michael Fitzgerald

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed March 19, 1993

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,
Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,
Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,
Defendants.

ORDER DENYING BAFCO DEFENDANTS' MOTION REQUESTING REMITITTUR ORDER

THIS CAUSE came before the Court on the BAFCO Defendants' motion requesting remititur order. The Court having considered the motion, the response, and the relevant portions of the record, including the trial transcript, it is hereby

ORDERED AND ADJUDGED that the BAFCO motion for remititur is DENIED.

DONE AND ORDERED in chambers this 19th day of March, 1993, at the United States District Court for the Southern District of Florida.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: Eugene Stearns
Raymond Siderius
Michael Fitzgerald

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed June 28, 1993

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,
Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,
Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,
Defendants.

ORDER ON PLAINTIFFS' MOTION TO AMEND JUDGMENT TO ADD PRE-JUDGMENT INTEREST

THIS CAUSE came before the Court on Plaintiffs' Motion to Add Pre-Judgment interest. After supplemental briefing, the parties are now in agreement that District Courts have broad discretion to determine the rate applicable to awards of pre-judgment interest.

Courts have held, in permissive rather than mandatory language, that the post-judgment interest statute does not preclude an award of prejudgment interest also[1]. Plaintiffs submit that this Court should perform a two-step analysis: first, whether the federal act creating the cause of action precludes an award of prejudgment interest and second, whether an award of such interest would further the Congressional policies of the act. *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983-4 (5th Cir. 1991).

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[1] Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

28 U.S.C. § 1961(a).

Where jurisdiction is predicated on a federal question, section 1961 does not preclude the award of prejudgment interest. *See*, *Guidry v. Booker Drilling Co., (Grace Offshore Co.)*, 901 F.2d 485, 488 (5th Cir., 1990). Prior to the enactment of the current statute, the old § 1961 provided that

> . . . execution may be levied for the interest on judgments recovered in the courts of the State. Such interest shall be calculated . . . at the rate allowed by state law.

28 U.S.C. § 1961 (now superseded by § 1961).

The replacement of § 1961 with § 1961(a) leaves little doubt that federal courts, especially in federal question cases, should apply the federal rate of interest pre-judgment as well as post-judgment. Plaintiffs' arguments for the imposition of the Florida state rate of interest are without merit.

Plaintiffs correctly argue first that the federal securities laws do not preclude an award of prejudgment interest and second that such awards would logically further Congressional policies to deter fraud and promote ethical standards of honest and fair dealing. *See*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195, 47 L.Ed.2d 668, 678, 96 S.Ct. 1375 (1976). Plaintiffs are also correct that "the award of pre-judgment interest in a private cause of action for violations of the securities laws is now well-established." Citing, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176, 103 L.Ed.2d 146, 155, 109 S.Ct. 987 (1989). Applying so simple and mechanical a formula as they have outlined it to be, Plaintiffs would seem entitled to an award of interest almost automatically in cases such as the present.

The High Court in *Osterneck*, however, left Courts with only a general menu of guidelines and the broadest latitude to decide whether to award prejudgment interest:

> In deciding if and how much prejudgment interest should be granted—a district court must examine—or in the case of a postjudgment motion, reexamine—matters encompassed within the merits of the underlying action. For example, in a federal securities action such as this case, a district court will consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness. . . . ("[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness"). These considerations are intertwined in a significant way with the merits of the plaintiff's primary case as well as the extent of damages.

Osterneck, 489 U.S. at 489, 103 L.Ed.2d at 155 (1989) (citing *Blau v. Lehman*, 368 U.S. 403, 414, 7 L.Ed.2d 403 [1962]) (other citations omitted).

Analysis pursuant to Osterneck

In this case, a jury has found, in essence, that a certain securities swap of subordinated debentures for limited partnership interests was so fundamentally unfair that Alan Levan, as managing general partner, could not have believed it to be fair when he allowed his statement of fairness to be included in the issuing prospectus.[2] The jury apparently believed that where the Bankatlantic bonds were subordinated and unsecured, where there was no mandatory schedule of interest payments, and where the principal owing was not due for twenty years after issuance, the exchange of those bonds for I.R.E. limited partnership interests was inherently unfair. This Court cannot say that the jury's verdict was irrational or without factual and evidentiary foundation, and has accordingly denied Defendants' motions for judgment as a matter of law and in the alternative for a new trial in prior orders.

However, as the undersigned has observed to the parties in Open Court, the precise basis for the jury's award is unclear. Defendants have shown that Plaintiffs failed to reduce their damage claim to present value as of any date certain, so that any calculation of interest by this Court would involve arbitrarily concluding facts not proven at trial. On the other hand, Defendants compellingly argue that Plaintiffs in I.R.E. Series 21 and 23 have already been awarded windfall recoveries, more than the Plaintiffs requested or sustained by evidence at trial. Defendants further point out that the Plaintiffs in Series 24 were undercompensated by the jury award, assuming the logic of the special verdicts rendered in Series 21 and 23

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[2] "Bankatlantic Financial Corporation Exchange Offer and Solicitation of Consents", February 18, 1989. The limited partnerships were known as I.R.E. Real Estate Fund, Series 21, 23, and 24.

was to award Plaintiffs' maximum damage estimate plus a premium[3].

The Court concludes that the jury made a good faith effort, without expert guidance or knowledge of accounting principles, to effect an award that would do precisely that: Plaintiffs' maximum award plus a premium. This Court, in its prior orders, has chosen not to tamper with the jury verdict in this case in any respect, and has denied Defendants' motions for remittitur and to interview the jurors. However, the Court cannot say that equity was served by awarding maximum damages plus a premium to the investors in Series 21 and 23, while awarding less than the Plaintiffs' expert testimony would have supported in Series 24.

The Court additionally concludes that the jury intended to award maximum damages plus interest, but failed to perform the correct calculations with regard to Series 24. Only for this reason—because the jury awards in I.R.E. Series 21 and 23 follow the same apparent (although very imprecisely estimated) ratios of adopting plaintiffs' maximum damages plus a premium[4] while the award in I.R.E. Series 24 did not—the Court will exercise its discretion to make a partial award of pre-judgment interest. In doing so, the Court seeks to preserve to the extent possible the jurors' verdict and apparent intent, while not leaving the investors in I.R.E. Series 24 short-changed as compared with their fellow-plaintiffs. The Court now declines to award any pre-judgment interest to the investors in IRE Series 21 and 23, but grants the federal rate of 3.54% to the investors in Series 24. Indeed, this is the solution suggested by the Defendants themselves. BAFCO Defen-

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[3] No evidence was presented, nor allegations made, that the investors in I.R.E. Series 24 suffer for any reason less damages than the investors in I.R.E. Series 21 and 23. Indeed, the jury verdict leads inescapably to the conclusion that the jury believed all investors had been injured in precisely the same way and to precisely the same degree.

[4] It may be that the jury awarded some rough estimate of lost interest, in calculating the premium over Plaintiffs' maximum estimate of damages.

dants' Response to Plaintiffs' Supplemental Memorandum of Authorities on Pre-Judgment Interest, file dated May 7, 1993, at 6. An award of pre-judgment interest is necessary in this one case to even out the discrepancy between the jury verdicts as between the three I.R.E. Series.

Orders

Having thus determined that a limited award of pre-judgment interest is warranted to cure the apparently unintentional inequities of the jury's verdict, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion to Amend Judgment to Add pre-judgment interest is GRANTED as to the Plaintiff investors in I.R.E. Real Estate Fund, Ltd., Series 24, and DENIED as to the Plaintiff investors in I.R.E. Real Estate Fund, Ltd., Series 21 and 23. Interest shall be calculated to run from March 31, 1989 through the date of entry of final judgment on December 18, 1992 at the federal rate of 3.54%.

DONE AND ORDERED in chambers at the United States District Court, West Palm Beach, Florida, this 28 day of June, 1993.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

copies provided:

Eugene E. Stearns
Ray Siderius

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed February 11, 1994

No. 93-4825

JOHN D. PURCELL; DEBRA K. PURCELL; DOUGLAS K. GROTHE; JOLENE M. GROTHE; HOWARD HELTON, *et al.*,

Plaintiffs-Appellees,

—versus—

BANKATLANTIC FINANCIAL CORP.; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 23, CORP.,

Defendants-Appellants,

SCOTT G. KRANZ; FRANK V. GRIECO; FIRST EQUITY CORP. OF FLORIDA,

Defendants.

WILLIAM A. SMITH; ELSE M. SMITH, husband & wife; RICHARD W. HAGEDORN; ETHEL V. HAGEDORN, husband & wife; FLOYD G. LAMAR, *et al.*,

Plaintiffs-Appellees,

—versus—

BANKATLANTIC FINANCIAL CORP., a Florida corporation; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 24, CORP., a Florida corporation,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA, a corporation,

Defendant.

TIMOTHY J. CHELLING,

Plaintiff-Appellee,

—versus—

BANKATLANTIC FINANCIAL CORPORATION; ALAN B. LEVAN; I.R.E. ADIVSORS SERIES 21, CORP.,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

No. 93-4879

JOHN D. PURCELL,

Plaintiff,

DEBRA K. PURCELL; DOUGLAS K. GROTHE; JOLENE M. GROTHE; JANE DOE GROTHE; HOWARD HELTON; DIANA HELTON; JANE DOE HELTON; WILLIAM E. WALL; SHIRLEY A. WALL,

Plaintiffs-Appellants,

—versus—

BANKATLANTIC FINANCIAL CORP.; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 23, CORP.,

Defendants-Appellees,

SCOTT G. KRANZ; FRANK V. GRIECO;
FIRST EQUITY CORP. OF FLORIDA,

Defendants.

WILLIAM A. SMITH; ELSE M. SMITH, husband & wife; RICHARD W. HAGEDORN; ETHEL V. HAGEDORN, husband & wife; FLOYD G. LAMAR, VICTORIA LAMAR, husband & wife; KENNEDY, HARRY B., KENNEDY, MARGARET M., husband & wife; HERMANN, BERNARD R.; JANE DOE SMITH; JANE DOE LAMAR; JANE DOE KENNEDY;

Plaintiffs-Appellants,

—versus—

BANKATLANTIC FINANCIAL CORP., a Florida corporation; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 24, CORP., a Florida corporation,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

TIMOTHY J. CHELLING,

Plaintiff-Appellant,

—versus—

BANKATLANTIC FINANCIAL CORPORATION;
ALAN B. LEVAN; I.R.E. ADVISORS SERIES 21, CORP.,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

Appeal from the United States District Court for the Southern District of Florida

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Before KRAVITCH, BIRCH and DUBINA, *Circuit Judges*.

BY THE COURT:

These appeals are DISMISSED for lack of jurisdiction. The district court's Final Judgment for damages and post-judgment orders are not final and appealable because the court has not disposed of the plaintiffs' equitable claim for rescission. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *Williams v. Bishop*, 732 F.2d 885 (11th Cir. 1984) (*per curiam*). The parties may seek review of all of the district court's rulings in these cases once the court has disposed of the rescission issue.

Federal Rule of Civil Procedure 24

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

Docket Nos. 89-1284-CIV-RYSKAMP
89-1605-CIV-RYSKAMP
89-1850-CIV-RYSKAMP

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife, *et al.*,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife, *et al.*,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

TIMOTHY J. CHELLING *et al.*,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida Corporation, *et al.*,

Defendants.

AMERICAN BROADCASTING COMPANIES, INC., and WILLIAM H. WILLSON,

Applicants for Intervention.

AMENDED COMPLAINT OF INTERVENORS

Third-party plaintiff-intervenors American Broadcasting Companies, Inc., a corporation organized under the laws of the State of New York, and William H. Willson, an individual employed by American Broadcasting Companies, Inc. (collectively referred to herein as "ABC"), for their pleadings in intervention allege as follows:

1. The above-captioned consolidated class action lawsuits (hereinafter the "*Purcell* action"), for which federal jurisdiction and venue were duly set forth in the complaints, came on for trial in this Court on civil claims for violation of federal securities law on December 7, 1992, concluding in a jury verdict rendered on December 17, 1992, in favor of the class action plaintiffs and against defendants Alan B. Levan ("Levan"), BankAtlantic Financial Corporation ("BFC") and others.

2. The plaintiffs in the above-captioned consolidated class actions were investors in real estate limited partnerships sponsored by Levan and BFC whose limited partnership interests

were exchanged by Levan and BFC for subordinated unsecured debt of BFC in "roll-up" transactions which took place in 1989 over their minority dissenting votes.

3. In response to special interrogatories, the *Purcell* jury found that Levan and BFC had committed securities fraud in that the roll-up transactions which Levan and BFC had proposed to their limited partners (and later consummated) were unfair and that at the time of the proposal Levan and BFC had falsely stated to their limited partners that they believed the transactions were fair when they knowingly believed otherwise. Levan and BFC were found liable to the *Purcell* class for $8 million in damages. (A copy of excerpts of the *Purcell* trial transcript is annexed hereto as Exhibit A; the portion recording the jury's answers to interrogatories is at pages 1635-36.)

4. This Court entered a Final Judgment, so denominated, on the jury verdict in the *Purcell* action on December 18, 1994. (A copy of the Final Judgment is annexed hereto as Exhibit B.)

5. This Court denied the *Purcell* defendants' motions for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial and for Remittur on March 18, 1993. (Copies of the Orders denying the motions are annexed hereto as Exhibit C.) The Court set out its reasons for denying these motions in its Order on Plaintiffs' Motion to Amend Judgment to Add Pre-Judgment Interest, issued on June 28, 1993. (A copy of that Order is annexed hereto as Exhibit D.) That Order stated, *inter alia*, that the Court could not find that the *Purcell* verdict against Levan and ABC "was irrational or without factual and evidentiary foundation."

6. The United States Court of Appeals for the Eleventh Circuit dismissed the *Purcell* defendants' appeal of the District Court judgment on February 11, 1994, on the sole ground that the *Purcell* plaintiffs' equitable claims for recission had not yet been disposed by the District Court. (A copy of the Court of Appeals' Order is annexed hereto as Exhibit E.)

7. The *Purcell* parties have agreed to settle their case. Under the terms of their proposed settlement, the defendants are to pay the full $8 million awarded by the jury to the plaintiffs. The defendants have insisted as a precondition for settling the action that any settlement agreement include a vacatur of the judgment and verdict and, on information and belief, a determination by the Court, in language drafted by defendants' counsel, purporting to adjudge that the judgment and verdict should not be accorded collateral estoppel effect as against third parties.

8. On February 7, 1992, Levan and BFC filed an action in this Court, styled as *Alan B. Levan and BankAtlantic Financial Corporation* v. *Capital Cities/ABC, Inc. and William H. Willson,* No. 92-325-CIV-ATKINS (the "*Levan* action"), claiming that a news report broadcast on the ABC News television program "20/20" concerning the limited partnership roll-up transactions that were the subject of *Purcell* and other related class and individual actions against Levan and BFC defamed them and placed Levan in a false light.

9. On July 22, 1993, Magistrate Judge William Turnoff, on consideration of ABC's motion for summary judgment in the *Levan* action, issued a Report and Recommendation recommending that the case be dismissed on the ground that the *Purcell* verdict and judgment conclusively established that the "gist" of the ABC broadcast was substantially true and thus collaterally estopped Levan and BFC from pursuing their libel claim. (A copy of the Magistrate's Report and Recommendation is annexed hereto as Exhibit F.)

10. On March 21, 1994, after completion of briefing by the *Levan* parties of Levan and BFC's objections to the Magistrate Judge's Report and Recommendation, Judge C. Clyde Atkins, the Judge presiding in the *Levan* action, issued an Omnibus Order staying the suit until the equitable claims in *Purcell* were disposed of and the *Purcell* judgment was thus rendered sufficiently final for appeal and observing that entry of such a final judgment in *Purcell* "would have a bind-

ing and preclusive effect in this [*i.e.*, the *Levan*] case." (A copy of Judge Atkins' Omnibus Order is annexed hereto as Exhibit G.)

11. Levan and BFC have stated in a submission to Judge Atkins that if the *Purcell* verdict and judgment are vacated by this Court pursuant to the *Purcell* settlement agreement, they intend to argue that those dispositions can have no preclusive impact in the *Levan* case and that they may therefore relitigate in the *Levan* case the issue of whether their roll-ups were fair to investors. (A copy of that submission, entitled "Plaintiffs' Report on the Status of the *Purcell* Case," without its accompanying attachments, is annexed hereto as Exhibit H.)

12. On June 6, 1994, Judge Atkins entered an Order which, after referring to the agreement of the *Purcell* parties "in principle" to settle the case and to have "the *Purcell* judgment vacated in its entirety," concluded that the status of the *Purcell* judgment "creates a problem" because the judgment "may no longer be 'final.' " On that basis, Judge Atkins rejected the recommendation of Magistrate Judge Turnoff that summary judgment be granted to defendants and referred the matter "to the Magistrate for further consideration in light of the circumstances in *Purcell*." (A copy of the Order of June 6, 1994 is annexed hereto as Exhibit I.)

13. On information and belief, defendants' insistence, as set forth in paragraph 7 of this Amended Complaint, that they obtain an order vacating the judgment and verdict previously entered in this case and language drafted by their counsel asserting that the judgment and verdict should not be accorded collateral estoppel effect as against third parties arises out by their knowledge that the *Purcell* verdict and judgment would bar their prosecution of the *Levan* litigation. In fact, the vacatur of the *Purcell* verdict and judgment or any other act by this Court to limit or eliminate the future preclusive effect of that verdict and judgment may seriously jeopardize ABC's ability to invoke the doctrine of collateral estoppel to prevent Levan and BFC from relitigating against

it an issue already fully and fairly determined at a trial before this Court and thus to end the *Levan* litigation. ABC's ability to protect its direct, substantial and legally protectable interest in preserving the preclusive effect of the *Purcell* verdict and judgment may thus be impeded and impaired as a practical matter.

14. ABC's interest in preserving the collateral estoppel effect of the *Purcell* verdict and judgment is not represented by the *Purcell* defendants, whose interests are directly adverse to ABC's, and is also not adequately represented by the *Purcell* class, which—having, on information and belief, been offered in settlement the entire amount that the jury awarded it at trial—has no incentive whatsoever to reject the condition set down by the defendants that it join in asking the Court to vacate the *Purcell* verdict and judgment and to adopt language, drafted by defendants' counsel, purporting to adjudge that the verdict and judgment should not be accorded collateral estoppel effect as against third parties.

15. The request for vacatur of the *Purcell* verdict and judgment in the circumstances presented here amounts to an attempt by Levan and BFC to manipulate the processes of this Court by "buying back" an adverse judgment precisely so that they may relitigate as plaintiffs against ABC the very issues already determined in *Purcell* and thus threatens not only the personal rights of ABC but also the values of finality, judicial economy, and public respect for the legal system.

16. The *Purcell* verdict and judgment should not be vacated.

17. This Court should not determine the collateral estoppel effect, or any other effect, of the *Purcell* verdict and judgment on the *Levan* case.

WHEREFORE, Intervenors American Broadcasting Companies, Inc., and William H. Willson pray that they be made parties to this action and that, as such, this Court grant them the relief they seek by declining to vacate the *Purcell* verdict

and judgment and declining to do any other act to limit or eliminate the future preclusive use of that verdict and judgment by any third party.

July 1, 1994

Respectfully submitted,

Floyd Abrams
Susan Buckley
Anne B. Carroll
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

BY: EDWARD A. KAUFMAN

Edward A. Kaufman
Florida Bar No. 041685
Raymond V. Miller
Florida Bar No. 328901
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN
200 South Biscayne Boulevard
Miami, Florida 33131
(305) 372-5200

Attorneys for Applicants for Intervention

[Exhibits omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
AT WEST PALM BEACH

Case No. 89-1284-CIV-RYSKAMP

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife; *et al.*,
Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION
a Florida corporation; *et al.*,
Defendants.

Case No. 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife; *et al.*,
Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,
Defendants.

Case No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,
Defendants.

[PROPOSED] FINAL JUDGMENT APPROVING SETTLEMENT AND ORDER OF DISMISSAL

THIS MATTER came before the Court on the joint motion of the Class Representatives, on behalf of the Exchange I Class Members, as those terms are defined in the Stipulation Of Settlement, dated as of June 8, 1994, (the "Stipulation"), and on behalf of BankAtlantic Financial Corporation, I.R.E. Advisors Series 21 Corp., I.R.E. Advisors Series 23 Corp., I.R.E. Advisors Series 24 Corp. and Alan B. Levan, for approval of a settlement in these actions, as embodied in the Stipulation. The Court, having considered all papers filed in connection with said motion and good cause appearing therefore, hereby FINDS AND DETERMINES AS FOLLOWS:

1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs. The court found during the pretrial and trial that the disclosure document distributed to the former limited partners of the three partnerships fully and adequately disclosed the terms of the proposed transaction and the risks of the proposed transaction. The aspects of the proposed transaction that plaintiffs contended at trial to be unfair, were fully and adequately disclosed to the plaintiffs in the disclosure documents. Indeed, these plaintiffs, who each voted against the transaction, did so in large measure because what they read about the transaction in the prospectus persuaded them that it was not in their best interest.

2. The claim asserted under the principles of *Virginia Bankshares v. Sandberg*, 111 S.Ct. 2749 (1991) that, notwithstanding the adequacy of disclosure, defendants' stated opinion of fairness while allegedly believing otherwise, was a troublesome one for the court because of the adequacy of risk and conflict disclosure, because the evidence that anyone relied upon that opinion was scanty at best, and because the evidence that BankAtlantic Financial Corporation and Alan B. Levan believed the transaction to be unfair was weak, particularly since BankAtlantic Financial Corporation agreed to

pay more for the former partnership assets than those assets turned out to be worth, albeit over a lengthy time period.

3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. That concern was heightened by the fact that their decision could easily have been influenced by the progression of elderly claimants who did not want twenty year debentures regardless of the fairness of the proposed transaction (As one elderly witness testified, "I don't even buy green bananas any more.") or by the extensive adverse pre-trial publicity. In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.

4. The jury rendered its verdict in the cause on December 17, 1992. The jury found that the debenture exchange transaction was unfair, the defendants knew it was unfair, and defendants' representation that it was fair was a material misrepresentation. The jury awarded plaintiffs damages totaling eight million dollars. The court entered a judgment on the verdict December 18, 1992.

5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

6. The terms of the settlement of this case are conditioned upon setting aside the verdict of the jury and the final judgment in this cause. This court has no reservation whatsoever in doing so.

7. This Court has jurisdiction over the subject matter and parties to these actions and over all parties to the Stipulation, including all Exchange I Class Members, as defined in the Stipulation.

8. The settlement embodied in the Stipulation is fair, reasonable and adequate to the Exchange I Class Members, as defined in the Stipulation.

9. The notice given to the Exchange I Class Members of the settlement set forth in the Stipulation, as required by this Court's Order Preliminarily Approving Proposed Class Settlement and providing for Notice of Pendency and hearing on Proposed Settlement of Class Action, entered on _____, 1994, was the best notice practicable under the circumstances, including individual notice to the Exchange I Class Members who could be identified through reasonable effort. Said notice provided due and sufficient notice of the proceedings regarding final approval of the settlement, including the terms of the proposed settlement set forth in the Stipulation, to all persons entitled to such notice, and said notice fully satisfied the requirements of due process.

Having considered the foregoing, the presentation of counsel and the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The Stipulation of settlement is hereby ratified and approved by the court.

2. With the exception of those persons identified on Exhibit A to the Stipulation of Settlement, all of whom filed valid and timely requests for exclusion from the class previously certified in this action, the Court hereby dismisses, with prejudice and without costs to any party as against any other, except as provided in the Stipulation, this action and any and all claims, actions, or causes of actions alleged by the Class Representative, individually and on behalf of the Exchange I Class Members, in the above-captioned action against the Settling Defendants.

3. The Exchange I Class Members shall be deemed, subject to Paragraph VI.X. (1) of the Stipulation, conclusively to have released and are hereby permanently barred and enjoined from prosecuting against BankAtlantic Financial Corporation, Alan B. Levan, IRE Advisors Series 21, Corp., IRE Advisors Series 23, Corp., IRE Advisors Series 24, Corp., ("the Settling Defendants"), including, without limitation, his or its respective predecessors and successors, parents, subsidiaries and affiliates and all their present and former partners, principals, officers, directors, employees, agents, attorneys, assigns, representatives, heirs, executors and administrator any and all claims, actions, or causes of action of whatever nature, character or description, whether known, unknown, suspected or unsuspected which were brought against the Settling Defendants in this case or which should have been brought as compulsory claims in this case and which among other things, allege that investors in the Exchange I Partnership were wrongfully deprived of their partnership interests and wrongfully given, in exchange for those interests, BFC Debentures, or which relate to or arise out of the Exchange I Partnerships, the termination thereof, Exchange I itself, or the BFC debentures, including the debt evidenced therein.

4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

5. Without affecting the finality of this judgment, the Court hereby reserves jurisdiction over (a) implementation of this settlement and any award or distribution of the proceeds of the settlement, including interest earned thereon; (b) disposition of the settlement proceeds; (c) any hearing and/or determination on the application of counsel for the Class

Representative for attorneys' fees, costs, interest and expenses in this action; and (d) enforcement and administration of the Stipulation.

DONE AND ORDERED in open Court at West Palm Beach, Florida this ___ day of _____, 1994.

_____

UNITED STATES DISTRICT COURT JUDGE

G:\W-LIT\07826\068\ORDER-1.FJE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed March 21, 1994

Case No.: 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and BANKATLANTIC FINANCIAL CORP., a Florida corporation,

Plaintiffs,

—v.—

CAPITAL CITIES/ABC, INC., a New York Corporation, and WILLIAM H. WILLSON, an individual,

Defendants.

OMNIBUS ORDER

THIS CAUSE comes before the Court on various motions.

First, the Court must address plaintiffs' Motion to Stay All Proceedings (d.e. 235) pending resolution of their appeals from the *Purcell, et al. v. BankAtlantic Financial Corporation, et al.* jury verdict.[1] It is important to note that the Motion to Stay was not brought to the attention of this Court at the time plaintiffs filed the first *Purcell* appeal on April 18, 1993.[2] Neither did plaintiffs move to stay these proceedings after they filed their second and third appeals on July 28,

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[1] Consolidated case numbers 89-1284-CIV-RYSKAMP, 89-1605-CIV-RYSKAMP and 89-1850-CIV-RYSKAMP.

[2] Appeal number 93-4418.

1993.[3] Only after the Magistrate ruled in favor of defendants did plaintiffs move to stay all proceedings.[4]

Defendants' Motion for Summary Judgment (d.e. 68) claims that the defamation action cannot stand because plaintiffs were precluded from maintaining that the gist of the broadcast was false. Plaintiffs are correct in stating that a non-final appeal could have negative consequences against a judgment based on the non-final *Purcell* verdict. Any pending appeal would affect disposition of defendants' Motion for Summary Judgment because the Magistrate based his recommendation (d.e. 203) on the collaterally preclusive effect of the final decision in *Purcell*. Recently, however, plaintiffs' three appeals from the Purcell verdict have been dismissed.

The Court is concerned that this case has been delayed so long. Originally, defendants filed their Motion for Entry of Order Determining that Plaintiffs are Public Figures (d.e. 66) and Motion for Summary Judgment (d.e. 68) on February 16, 1993. The R&R was issued in a timely manner on July 22, 1993. Due to the fact that parties' objections did not meet the page limits set forth in the Rules, the R&R was not ripe for review until the end of November, 1993. Other pleadings have also awaited the Eleventh Circuit's decision. *See* below.

Presently, the Court awaits entry of judgment in *Purcell*. When and if the Clerk enters judgment,[5] it would have a binding and preclusive effect on this case. Therefore, parties are hereby *DIRECTED* and *ORDERED* to notify the Court of such judgment and the status of *Purcell*.

Second, defendants moved for partial summary judgment on the issue of whether plaintiffs are public figures for purposes of this litigation (d.e.s 66-67). The Court agrees that Levan "attempt[ed] to have, or realistically [could have been] expected to have, a major impact on the resolution of a

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[3] Appeals numbered 93-4825 and 93-4879.

[4] Plaintiffs filed their Motion to Stay on October 1, 1993 (d.e. 235), almost three months after the R&R.

[5] *See* Fed. R. Civ. P. 58 and Form 31—Judgment on Jury Verdict.

specific public debate that [had] foreseeable and substantial ramification for persons beyond the immediate participants." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *Sylvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494-98 (11th Cir. 1988). However, based on the above, the Court cannot, at this time, rule on whether the "gist" of the 20/20 broadcast was substantially true as a matter of law given that the jury in *Purcell* found that (1) the transaction proposed by BankAtlantic was unfair to the limited partners and (2) the general partners, the company, or "Alan Levan falsely stated in the Prospectus and the transmittal letter that they believed that the Exchange transaction was 'fair' when they knowingly believed otherwise."

Upon independent review of the record, objections to the R&R and being fully advised of the premises, it is

ORDERED AND ADJUDGED that the July 22, 1993 R&R (d.e. 203) is *ADOPTED in part* and *DEFERRED in part* as follows and made an Order of this court. The Court adopts the Magistrate's reasoning on pages 1-13 of the R&R. However, because the Motion for Summary Judgment was based on the preclusive effect of *Purcell*, the Court defers ruling on the latter half of the R&R until *Purcell* is resolved.

Based on the above, it is

ORDERED AND ADJUDGED that plaintiffs' October 1, 1993 Motion to Stay Proceedings (d.e. 235) is *GRANTED*. A ruling on defendants' February 16, 1993 Motion for Summary Judgment (d.e. 68) is *DEFERRED* until further notice. Accordingly, it is

ORDERED AND ADJUDGED that defendant's February 16, 1993 Motion for Entry of Order Determining that Plaintiffs are Public Figures (d.e. 66) is *GRANTED*. It is further

ORDERED AND ADJUDGED that plaintiffs' Motion for Leave to File Reply Memorandum in Support of Motion to Stay in Excess of Ten Pages (d.e. 240) is *GRANTED*.

Finally, on March 11, 1993, defendants filed a Motion in Limine to Exclude Evidence Concerning and to Bar Recovery of Damages Claimed by Plaintiffs (d.e. 115). This Motion was deferred to the Court on June 4, 1993 (d.e. 172). Also, on July 27, 1993, plaintiffs appealed (d.e. 205) the Magistrate's July 20, 1993 Order Granting Defendants' Motion to Compel Discovery (d.e. 202-2) on the issue of witness bias. If affirmed, the plaintiffs would have to produce any information regarding fees paid by plaintiffs to attorneys who have represented plaintiffs and who have been identified as fact witnesses for this action. Finally, on July 26, 1993, defendants appealed (d.e. 204) the Magistrate's July 20, 1993 Order Granting Plaintiffs' Motion to Compel Discovery (d.e. 202-1). This action ordered defendants to produce certain documents and information asserted by them to be privileged. The Magistrate found such evidence to be relevant and discoverable.

Due to the above ruling deferring defendants' Motion for Summary Judgment, it is hereby

ORDERED AND ADJUDGED as follows:

1) defendants' Motion in Limine (d.e. 115) is *DEFERRED* as above;

2) plaintiffs' appeal (d.e. 205) of the Magistrate's July 20, 1993 Order Granting Defendants' Motion to Compel Discovery (d.e. 202-2) is *DEFERRED* as above;

3) defendants' appeal (d.e. 204) of the Magistrate's July 20, 1993 Order Granting Plaintiffs' Motion to Compel Discovery (d.e. 202-1) is *DEFERRED* as above;

4) defendants' Request for Oral Argument upon Plaintiffs' Motion to Stay and the Plaintiffs' and Defendants' Objections to the Magistrate's R&R (d.e. 237) is *DENIED*;

5) parties' joint Notice for Hearing (d.e. 254) is *DENIED*; and

6) plaintiffs' Motion to Extend Time Until February 25, 1994, to File Reply in Support of their Motion to Compel Discovery (d.e. 260) is *GRANTED*.

DONE AND ORDERED at Miami, Florida, this 19th day of March, 1994.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES DISTRICT JUDGE

cc: The Honorable William C. Turnoff
Susan Buckley, Esq.
Jay B. Shapiro, Esq.
Alan Fein, Esq.
Raymond Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed June 6, 1994

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and BANKATLANTIC FINANCIAL CORP., a Florida corporation,

Plaintiffs,

—v.—

CAPITAL CITIES/ABC, INC., a New York Corporation, and WILLIAM H. WILLSON, an individual,

Defendants.

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on the latter half of the Honorable Magistrate William C. Turnoff's Report and Recommendation (R&R) (d.e. 203). On March 21, 1994, the Court deferred ruling on the Magistrate's recommendation regarding defendants' Motion for Summary Judgment (d.e. 68) because the Magistrate based his recommendation on the preclusive effect of *Purcell* (89-1284-CIV-RYSKAMP, 89-1605-CIV-RYSKAMP and 89-1850-CIV-RYSKAMP), a similar, consolidated case in a different court. At the time of the Magistrate's R&R, the *Purcell* jury had returned a verdict which was appealed by the defendants (plaintiffs herein) to

the Eleventh Circuit Court of Appeals. After the Magistrate issued his R&R, however, the Eleventh Circuit dismissed the appeals due to the lack of finality in the judgment. Since the dismissal, the *Purcell* parties agreed, in principle, to settle the case. Pursuant to the settlement agreement, parties will agree to having the *Purcell* judgment vacated in its entirety.

The *Purcell* settlement creates a problem in this case because, in the R&R, the Magistrate recommended that defendants' Motion for Summary Judgment be granted solely on the preclusive effect of the final judgment in *Purcell*, a judgment which may no longer be "final." Consequently, the Court must reject that portion of the R&R relating to the Motion for Summary Judgment and refer the matter to the Magistrate for further consideration. Accordingly, it is

ORDERED AND ADJUDGED that pages 13 through 18 of the Magistrate's R&R (d.e. 203) is *REJECTED*. The Motion for Summary Judgment (d.e. 68) is hereby *REFERRED* to the Magistrate for further consideration in light of the circumstances in *Purcell*.

This Court continues the deferral of docket entries 115, 204 and 205 until the above Motion for Summary Judgment is resolved.

DONE AND ORDERED at Miami, Florida, this 6th day of June, 1994.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES DISTRICT JUDGE

cc: The Honorable William C. Turnoff
Susan Buckley, Esq.
Alan Fein, Esq.
Raymond Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed August 18, 1995

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation,

Plaintiffs,

—v.—

CAPITAL CITIES/ABC, INC., a New York Corporation, and WILLIAM H. WILLSON, an individual,

Defendants.

NOTICE TO COUNSEL

THIS CAUSE comes before the court *sua sponte*. The Magistrate Judge's April 17, 1995 Report and Recommendation recommending that defendants' summary judgment motion be denied is currently before the court for consideration. It has come to the court's attention that defendant ABC's appeal from Judge Ryskamp's denial of its Motion to Intervene in the *Purcell* case to be heard in opposition to the vacatur of the verdict and judgment, as well as its appeal from the subsequent stipulated judgment in *Purcell*, are pending before the Eleventh Circuit. Given the likelihood that the resolution of these appeals may affect the outcome of the motion for summary judgment addressed in the report and recommendation, the court shall defer ruling on the report and recommendation until the appeals have been resolved. Accordingly, it is

ORDERED AND ADJUDGED that the parties *shall* file with the court a joint report on the status of the appeals every thirty (30) days. Parties shall deliver a courtesy copy to the chambers of the undersigned.

DONE AND ORDERED at Miami, Florida, this 18th day of August, 1995.

/s/ WILLIAM M. HOEVELER
SENIOR UNITED STATES DISTRICT JUDGE
for Judge Atkins

cc: Honorable Magistrate Judge Turnoff
Susan Buckley, Esq.
Raymond Miller, Esq.
Alan Fein, Esq.
Floyd Abrams, Esq.

Supreme Court, U.S.
FILED
AUG 21 1996
CLERK

(2)

No. 96-124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Ray Siderius
C.R. Lonergan, Jr.
SIDERIUS LONERGAN
500 Union Street, Ste 847
Seattle, Washington 98101
206/624-2800

Counsel of Record for Respondents Purcell and Class

aBCD Legal Printers, Seattle, Washington

34 pp

QUESTION PRESENTED FOR REVIEW

Whether Petitioners' interest in the collateral estoppel effect in a separate libel action of the jury verdict in this securities fraud class action is a direct, substantial, legally protectable interest as required by Rule 24(a)(2), Federal Rules of Civil Procedure to support intervention of right.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 4

ARGUMENT FOR DENYING PETITION:

THE COURT OF APPEALS DID NOT REACH PETITIONERS' U.S. BANCORP ARGUMENT . . 8

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS 10

CONCLUSION 26

APPENDIX

ORDER OF U.S. COURT OF APPEALS OF FEBRUARY 11, 1994 . . . . . 1a

TABLE OF AUTHORITIES

Cases **PAGE**

Alameda Water & Sanitary Dist. v. Browner, 9 F.3d 88 (10th Cir. 1993) 18

Appalachian Power Co. v. Amer. Institute of Cert. Public Accountants, 361 U.S. 83, 4 L.Ed.2d 30, 80 S.Ct. 16, ... 23

Blonder Tongue Labs v. University Foundation, 402 U.S. 313, 329, 28 L.Ed.2d 788, 91 S.Ct. 1434 (1971). 5

Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989) 15,16, 18, 19

City of Cleveland, Ohio v. NRC, 17 F.3d 1515 (D.C. Cir. 1994) 17

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) 14

Greene v. U.S., 996 F.2d 973 (9th Cir. 1993) 15

International Paper Co. v. Town of Jay, 887 F.2d 338 (1st Cir. 1989) 20

Izumi Seimitsu Kogyo v. U.S. Philips Corp., 971 F.2d 728 (Fed. Cir. 1993) certiorari dismissed as improvidently granted in 510 U.S. 27, 126 L.Ed.2d 396, 114 S.Ct. 425 (1993) 8, 13, 22,23

Meador, et al. v. Bankatlantic Financial Corporation, et al., Case No. 91-29892 ..... 4, 5, 7

Missouri-Kansas Pipeline Co. v. United States of America, 312 U.S. 502, 85 L.Ed. 975, 61 S.Ct. 666 (1941) . 22

National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989) 13

Purcell v. Bankatlantic, et al., 85 F.3d 1508 ..... 3-9, 11-15, 17,18, 20, 24-26

U.S. Bancorp v. Bonner Mall Partnership, 513 U.S. ___, 130 L.Ed.2d 233, 115 S.Ct. 386 (1994) 3, 8-10, 26-27

U.S. v. State of Michigan, 680 F.Supp. 928 (D.C. W.D. Mi. 1987) 18

United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 48 L.Ed.187, 96 S.Ct. 1684 (1976) 21

United States v. Hooker Chemicals & Plastics, 749 F.2d 968 (2nd Cir. 1984) 16, 17, 21

United States v. Texas E. Transmission Corp., 923 F.2d 410, (5th Cir. 1991) 21

Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813, 75 L.Ed. 728, 51 S.Ct. 214 (1931) 14

Constitution of the United States

Article III 17, 18

Rules

Federal Rules of Civil Procedure

Rule 24 ..... i, 1-3, 7, 11, 12, 14-27

Rules of the Supreme Court of the United States

Rule 10 10

Treatises

3B, James Wm. Moore, Moore's Federal Practice, Second Edition, ¶24.07[1] 20, 21

7C Charles A. Wright, *et al.*, Federal Practice and Procedure, (2d ed. and Supp. 1996) §1908 ..... 19, 20, 25

No. 96-124

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

--v.--

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioners present two questions: the first is not presented by the record and the second factually incorrect.

The true question presented by this record is: whether Petitioners' interest in the collateral estoppel effect in a separate libel action of the jury verdict in this securities fraud class action is a sufficiently direct, substantial and legally protectable interest to secure intervention of right as required by Federal Rule of Civil Procedure 24(a)(2).[1]

In Question #2, Petitioners declare: "...no new factual or legal developments have occurred after entry of judgment except the agreement of the parties to settle the case." Petition for a Writ of Certiorari at p. *i* (hereinafter "Petition"). This is a misstatement. In fact, following entry of judgment on February 11, 1994, the Court of Appeals declared the judgment non-final and remanded to the District Court to resolve, *inter alia*, whether the Class Members were entitled to ownership of the debentures in addition to the damages awarded by the jury. See Order of U.S. Court of Appeals (R2-418).[2] Appendix to this Brief in Opposition to Writ of Certiorari, p. 1a (hereinafter "Purcell Appendix").

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[1] Petitioners had in the Court of Appeals also argued the District Court abused its discretion in denying permissive intervention under Rule 24(b)(2). The petition abandons this argument.

[2] Citations to "R__" are references to the Record on Appeal in the Court of Appeals.

This is not a meaningless detail, but the subject of a hotly contested issue of great importance, finally resolved by a settlement agreement providing for cancellation of the debentures and waiver by the Class Members of $839,378.99 in accrued interest. Petitioners' construct of the issue is flawed because it does not address the grounds upon which the Court of Appeals based its decision. Purcell v. Bankatlantic, et al., 85 F.3d 1508, Appendix of Petitioners, 1a. Properly put, the question is whether Petitioners' interest in the collateral estoppel effect in a separate libel action is the kind of direct, substantial and protectable interest legally adequate to support intervention of right in the securities fraud case. That a settlement may embody, as it did here, a provision for vacatur does not rewrite Rule 24(a)(2) or enlarge Petitioners' rights under it.

This case is about Rule 24(a)(2) and the status required to intervene in post-judgment settlement. The Court of Appeals applied the Rule properly. Petitioners' claim to intervention of right rests on a single case: U.S. Bancorp v. Bonner Mall Partnership, 513 U.S. ___, 130 L.Ed.2d 233, 115 S.Ct. 386, (1994).

Petitioners fail to recognize that the issue before the Court of Appeals in Purcell was whether or not Petitioners should be permitted to intervene. Petitioners urge this court to apply U.S. Bancorp language but that language would be

meaningful only if Petitioners were actually granted intervention and had become a party to the case.

STATEMENT OF THE CASE

The Petitioners' statement of the case is generally accurate, but omits reference to the other class action arising out of the same debenture exchange transaction. The other class action entitled Meador, et al. v. Bankatlantic Financial Corporation, et al., Case No. 91-29892, was filed during 1991 against BFC, Levan and others in Florida (Broward Circuit Court) as a securities fraud class action on behalf of a class composed of the "yes" voters in the 1989 exchange. (R3-443, pp. 2-9.) The Purcell class is composed of those limited partners whose vote on the exchange was recorded as "no." The attorneys for the Purcell class were not in any way involved in the filing or conduct of that action. The attorneys representing the plaintiff class in Meador carefully monitored the progress of the Purcell action because the Purcell action filed in 1989 would be, and ultimately was, the first case to go to trial. The Meador class action involved over 4,000 Class Members. The plaintiffs' attorneys in Meador concluded a settlement with Levan and BFC on behalf of that class prior to the Purcell settlement that ABC seeks to upset by this Petition. (R3-443, pp. 2-9.)

In other words, the Petitioners' statement of the case conveys an incorrect impression by suggesting that BFC and Levan, in attempting to settle Purcell, were interested merely in "seeking to erase the jury's verdict and the resulting final judgment." (Petition, p. 5.) BFC and Levan were in the process of settling both class actions on identical terms, and the Meador class had not even obtained a verdict and judgment to erase. The $8 million jury verdict in Purcell was used as a settlement model in determining the amount of settlement in Meador. (R3-443, pp. 2-9.)

The Petitioners' statement of the case does point out that as the Purcell action approached trial the Levan libel action was pending in the Southern District of Florida. However, the Petitioners' statement of the case omits mention of the fact that Petitioners' attorneys attended the Purcell trial and purchased a "daily record" transcript of all testimony and obtained copies of all exhibits. Petitioners sat on the sidelines[3] watching the progress of the Purcell action but did not attempt to intervene or file an *amicus* brief.

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[3] Sitting on the sidelines without moving to intervene thereby protected Petitioner ABC from itself being collaterally estopped in the event the result of the trial turned out adverse to the Petitioner ABC position. See Blonder Tongue Labs v. University Foundation, 402 U.S. 313, 329, 28 L.Ed.2d 788, 800, 91 S.Ct. 1434, 1443 (1971).

The Purcell judgment that was vacated was non-final because in February, 1994 the Court of Appeals remanded the appeal of Levan and BFC in the Purcell case to the District Court to take care of "rescission" issues.[4] (Purcell Appendix, p. 1a.) This "cancellation of the debentures" issue became the rescission issue that required the Court of Appeals to remand the case to the District Court for amendment of the judgment. At that point, the Purcell Plaintiffs held a "non-final" judgment and faced the prospect of modification of that judgment by the District Court. In addition, the question of the amount of post-judgment interest to which the Purcell Plaintiffs would be entitled was an open issue in view of the non-finality of the judgment, as was the question as to the date when interest would begin to accrue.

The Purcell Plaintiffs, Levan and BFC embarked upon settlement negotiations and concluded a comprehensive settlement, the principal terms of which are:

a. The face amount of the verdict of $8 million is to be paid in two installments, $4 million immediately and $4 million 30 months later bearing 7% interest;

---

[4] The District Court, over the objection of the Purcell Plaintiffs, had instructed the jury that a verdict in favor of the Plaintiffs would result in termination of liability in the debentures. The final judgment entered by the District Court did not provide for such.

b. The Purcell Plaintiffs waive their claim to pre-judgment and post-judgment interest which could have amounted at the time of settlement to $839,398.99; and,

c. The parties jointly request the District Court to vacate the verdict and judgment. This coupled with the Meador settlement brought all litigation arising from the 1989 debenture exchange to an end. (R3-443.)

Learning of the settlement, Petitioners moved to intervene in Purcell as of right under Rule 24(a)(2) and/or permissively. The motion was opposed by the Purcell Plaintiffs and Defendants. The District Court denied the motion to intervene. Petitioners appealed. The Court of Appeals decision which Petitioners seek review by Writ of Certiorari affirmed the District Court's decision in all respects, deciding, that Petitioners' "interest" in preserving for collateral estoppel purposes the Purcell verdict and judgment was not a direct, substantial and legally protectable interest sufficient to obtain intervention of right under Rule 24(a)(2). As will be seen later in this response, the Court of Appeals decision does not conflict with any decisions of any other United States Court of Appeals and, in fact, the only Court of Appeals decision on the issue of whether preservation of an interest in collateral estoppel is a

sufficiently important interest to permit intervention of right rules that it is not. [5]

ARGUMENT FOR DENYING PETITION: THE COURT OF APPEALS DID NOT REACH PETITIONERS' U.S. BANCORP ARGUMENT

Petitioners contend that the Purcell decision represents "a rejection of the core principles" articulated in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra. Petition, p. 21.

The Court of Appeals did not reach Petitioners' U.S. Bancorp argument.

The issue before the Court of Appeals in Purcell was whether or not Petitioners should be permitted to intervene. Petitioners' discussion of the U.S. Bancorp case involves a discussion of what would occur if and when Petitioners had been granted intervention and become a party to the case. In addition, Petitioners distort the U.S. Bancorp holding and its applicability to the case at bar. The first words of Justice Scalia's opinion in U.S. Bancorp show its plain thrust:

---

[5] Izumi Seimitsu Kogyo v. U.S. Philips Corp., 971 F.2d 728 (Fed. Cir. 1993) certiorari dismissed as improvidently granted in 510 U.S. 27, 126 L.Ed.2d 396, 114 S.Ct. 425 (1993).

> The question in this case is whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari is sought.

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. ___, 130 L.Ed.2d 233, 238, 115 S.Ct. 386, 388 (1994).

U.S. Bancorp is not a precedent for this case and is readily distinguishable. It involved a dispute between the original parties made after the Supreme Court had granted a petition for certiorari. After the Court had received briefing on the merits the parties entered a settlement and a contested motion to vacate the judgment for mootness was made to the court. In the Purcell case there was no dispute between the original parties nor was there any review of the judgment sought by the original parties. Petitioners' motion to intervene to vacate would have had the District Court rewrite the settlement agreement by annulling that part of the settlement agreement dealing with vacatur. The relief requested would effectively have abrogated the entire agreement. Apart from the fact that U.S. Bancorp involved a party to the action who was objecting to vacatur, in Purcell the settlement agreement was reached prior to any final judgment being entered by the District Court.

U.S. Bancorp which is the centerpiece of the Petition, does not involve intervention, does not stand for the proposition

that a non-party may object to vacatur, and most importantly, does not involve a settlement agreed to by the parties prior to the entry of final judgment.

Unlike the instant case, U.S. Bancorp involved a motion to vacate a Court of Appeals decision which had become a precedent of national importance. The Ninth Circuit opinion which by motion the bank attempted to vacate, involved an important precedent relating to bankruptcy priority. There were several separate amicus briefs filed in the Supreme Court and, by the time U.S. Bancorp was decided, the Ninth Circuit opinion had been cited in over 28 reported cases in circuit courts, district courts and bankruptcy courts. U.S. Bancorp bears little similarity to the case at bar which involves vacatur of a non-final judgment by the District Court.

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS

This case does not satisfy the considerations of Rule 10[6] for granting a Petition for a Writ of Certiorari. The decision of the Court of Appeals turned on the question whether Petitioners, admittedly not interested in the merits of this class action

---

[6] Rules of the Supreme Court of the United States.

securities litigation (that is to say Petitioners did not claim any interest in the debentures and hence were not real parties in interest), had an interest sufficient to meet the requirements of Rule 24(a)(2) for intervening as of right. See Purcell v. Bankatlantic, et al., supra, at 1513, Appendix of Petitioners at 8a:

> [T]hat measured against the Rule 24 requirement that it be 'a direct, substantial, legally protectable interest,' ABC's (Petitioners') interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect and insubstantial to support intervention as of right. Purcell, supra, at 1513; Appendix of Petitioners at 9a.

The decision whether to grant intervention turned on the facts and procedural posture of the case in the record at the time of the motion to intervene. The District Court had diligently supervised this litigation for over five years and brought it to an end by approval of all of the terms of the final settlement. The settlement agreed the Defendants would pay the 3,711 Plaintiff Class Members the face amount of the jury verdict upon waiver of pre-judgment and post-judgment interest that had accrued, in exchange for stipulated motion to vacate the jury verdict and resulting judgment. Only at the time a final settlement agreement was concluded bringing the action and related litigation to an end, did Petitioners file their motion to intervene

and then merely to preserve a potential defense in a collateral and unrelated lawsuit against it.

The Court of Appeals in its *de novo* review of the record found that:

> Permitting ABC to intervene for the purpose of blocking the vacatur would substantially prejudice Levan and BFC [the Respondents] because unless vacated, the jury verdict and judgment in the class action will preclude their libel claim against ABC [Petitioners]. Moreover, permitting ABC to intervene in the class action would also substantially prejudice the Plaintiffs, because the result ABC seeks would effectively vitiate the settlement agreement through which the Plaintiffs are receiving payments from the damage award. Purcell, supra, 85 F.3d 1508 at 1514; Appendix of Petitioners at 11a.

The decision of the Court of Appeals turning on the facts and procedural posture of the case does not involve any conflict with any decision of any other United States Court of Appeals.

Petitioners assert as a reason this court should grant their petition is that there is a "division among the circuits," stating that the Court of Appeals here denied intervention "on its extremely restrictive reading of Rule 24(a)(2)'s requirement that an intervenor must have an interest relating to the property or transaction which is subject to the action." (Petition, p. 16). Petitioners assert "similarly restrictive views have been

articulated by the Third, Fifth and Eighth Circuits" and argue that "these views" conflict directly with the views of the "D.C. and Ninth Circuits." Petition, pp. 17-18. The Court of Appeals found that the Petitioners had not cited any binding authority to support their argument they should be granted intervention based upon their interest in the collateral estoppel effect of the jury's verdict. Purcell, supra, 85 F.3d 1508, 1512; Appendix of Petitioners at 8a. The Court of Appeals distinguished the two cases cited by Petitioners, National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989) and a dissenting opinion from the Supreme Court's dismissal of certiorari as improvidently granted in Izumi Seimitsu Kogyo v. U.S. Philips Corp., 510 U.S. 27, 126 L.Ed.2d 396, 114 S.Ct. 425 (1993). Purcell, Ibid.; Appendix of Petitioners, Ibid.

Decisions cited by Petitioners purporting to establish a conflict with a decision of another Court of Appeals are easily distinguishable on their facts which Petitioners do not set out in any event. These cases when their facts are examined, fail to establish a conflict of the Purcell decision with the decision of another Court of Appeals. See Petition, pp. 16-19. Petitioners only provide phrases extracted from decisions and by comparison of language in various opinions seek to establish a "conflict of views" among the circuits amounting to what Petitioners describe as a "major circuit conflict about the kind of

interest required for intervention as of right under Rule 24(a)(2)." Petition at p. 11. But as the court has taken note in Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813, 75 L.Ed. 728, 51 S.Ct. 214 (1931):

> It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.

Petitioners rely on County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) as having "explicitly rejected the proposition that Rule 24(a) requires a 'specific legal or equitable interest' in the underlying property or transaction" as being in conflict presumably with language in the Purcell opinion that Rule 24 requires a "direct, substantial, legally protectable interest in the proceedings." See Purcell, supra 85 F.3d at 1512; Appendix Petition at 7a.

County of Fresno, which was an action to enjoin promulgation of a federal rule that would have injured intervenor's rights to purchase government land conferred by a Congressional enactment, pointed out in the opinion that the "individual members of (the intervenor) are precisely those Congress intended to protect with the reclamation acts...." On those facts the interest was held sufficient.

Petitioners, in their claim of conflict between the Eleventh and Ninth Circuit Courts of Appeal do not cite the later case of Greene v. U.S., 996 F.2d 973 (9th Cir. 1993) which denied intervention of right to the Tulalip Indian Tribe in an action by the Samish Indian Tribe against the government to obtain tribal recognition, the court holding Rule 24(a)(2) requires:

> [T]he movant must demonstrate 'a significantly protectable interest.' An economic stake in the outcome of the litigation, even if significant, is not enough. At p. 976.

Petitioners might just as well have claimed that the Purcell decision is in conflict with a leading Eleventh Circuit case on intervention of right, Chiles v. Thornburgh, 865 F.2d 1197, 1214 (11th Cir. 1989) where inmates in a federal detention facility were allowed intervention under Rule 24(a)(2) in an action challenging the government's operation of a detention facility as being insufficient to protect the security of a non-violent alien. The court in Chiles held the Rule 24(a)(2) requirement of "interest":

> is a flexible one, which focuses on the particular facts surrounding each [motion for intervention].

and also at p. 1214:

> The detainee's interest need not however, be of a legal nature identical to that of the class asserted in the main action. (Emphasis supplied.)

Petitioners' claim of a conflict between circuits based upon a supposed difference between the "extremely restrictive reading" of Rule 24(a)(2) of the Eleventh Circuit and the "far more flexible application" of Rule 24(a) "espoused" by the Second Circuit thus vanishes when the language Petitioners depend upon in United States v. Hooker Chemicals & Plastics, 749 F.2d 968, 983 (2nd Cir. 1984) to establish the conflict between the Circuits is compared with the language used by the Eleventh Circuit in the Chiles case. Both Circuits acknowledge the flexibility that Rule 24(a)(2) is intended to provide in the determination whether to grant intervention in each particular case depending upon its facts and procedural posture. United States v. Hooker Chemicals, supra affirmed the denial of a Rule 24(a)(2) intervention in an action by the U.S. Government against Hooker Chemical for hazardous waste. The claimed interest supporting intervention was the exposure of the proposed intervenors to drinking water which had been treated by Hooker Chemical. The decision turned on the adequacy of representation requirement of Rule 24(a)(2) by the government which was suing *parens patria*. Like the other cases cited by

petitioner, Hooker Chemical is distinguishable on its particular facts. No decision has been cited which is in conflict with the Purcell decision.

Petitioners' assertion that there is a "split on the meaning of Rule 24(a)(2)'s interest requirement as dividing Second, Sixth, Tenth and D.C. Circuits on the one hand, and the Fifth, Seventh, Eleventh and Federal Circuits on the other" does not stand scrutiny when the cases are analyzed. For example, City of Cleveland, Ohio v. NRC, 17 F.3d 1515 (D.C. Cir. 1994) is a case where an electrical co-op sought intervention under Rule 24(a)(2) in a proceeding before the Nuclear Regulatory Commission to challenge conditions in an operating permit for a nuclear plant. The court held that the proposed intervenor had no economic relationship to the power plants in question and its interest in the precedental effect of an adverse decision does not constitute interest sufficient to comply with the requirement of "interest" under Rule 24(a)(2). The court stated that under Rule 24(a)(2) proposed intervenor must satisfy Article III standing requirements in order to participate in litigation. The court stated that a proposed intervenor under Rule 24(a)(2) "must satisfy the same standing requirements as are imposed upon the original parties." If anything, the court in the City of Cleveland, Ohio case imposes a stricter requirement than the Eleventh Circuit which does not require a proposed intervenor under Rule

24(a)(2) to establish Article III standing requirements if there is a "justiciable case and controversy between the parties already in the lawsuit." Chiles v. Thornburgh, supra at p. 1213. Also in Alameda Water & Sanitary Dist. v. Browner, 9 F.3d 88, 90 (10th Cir. 1993) the court in affirming denial of intervention sought by an environmental group in an action by a water district against the EPA, challenging the EPA's veto of a permit to discharge fill material into U.S. waters, held that under Rule 24(a)(2) "intervention requires that [proposed intervenors'] interest in the proceedings be 'direct, substantial and legally protectable.'" This language used by the D.C. Circuit cannot arguably be held to be in conflict with the language of the court in the Purcell case which Petitioners quote as being the source of conflict in views between the circuits "direct, substantial, legally protectable interest in the proceedings." (Petition at pp. 16-17.) U.S. v. State of Michigan, 680 F.Supp. 928 (D.C. W.D. Mi. 1987), in a circuit Petitioners contend is in conflict with the Eleventh Circuit in its "views" of the interest requirement for Rule 24(a)(2), allowed intervention by inmates of a Michigan prison in an action sought by the United States challenging conditions in another Michigan prison. The facts are remarkably similar to those in Chiles v. Thornburgh, supra which allowed intervention under similar circumstances. The District Court in the Michigan case held that the prisoner's interest in the

proceedings was "an interest relating to the property or the transaction which is the subject of the action." Petitioners' contention that the Eleventh Circuit employs an "extremely restrictive reading of Federal Rule of Civil Procedure 24(a)(2)'s requirement that an intervenor of right have 'an interest relating to the property or transaction which is the subject of the action'" falls apart when the facts and holding in Chiles v. Thornburgh, supra are compared with the very similar Sixth Circuit case also allowing intervention by inmates in a pending suit.

Petitioners have put forth a misleading citation purporting to establish "the stark conflict between the Circuits." (Petition at p. 19, fn. 14.) The citation from Charles A. Wright, et al., Federal Practice & Procedure, §1908 is incomplete and misleading. All that Petitioners quote from that text is statement that there has been "[no] clear definition, either from the Supreme Court or from the lower courts, of the nature of the interest" required by Rule 24(a)(2). The complete quotation which more accurately reflects the author's analysis is as follows:

> There is not as yet any clear definition of the nature of the 'interest relating to the property or transaction which is the subject of the action' that is required for intervention of right. Indeed, it may well be that this is a question not worth answering. (Emphasis supplied.)

> 'Significantly protectable interest' has not been a term of art in the law and there is sufficient room for disagreement about what it means so that this gloss on the rule is not likely to provide any more guidance than the bare term 'interest' used in Rule 24 itself.
>
> It is worth emphasizing that intervention of right may not be had in every case in which a decision might have an inhibiting effect as *stare decisis.*

7C, C. A. Wright, et al., Federal Practice & Procedures, §1908 at 263, (Second Edition) and at p. 17, 1996 Supplement.

The Purcell case presents a familiar pattern of the application by a District Court of Rule 24(a)(2). The Court of Appeals, after review de novo, affirmed the District Court in denying Petitioners' Motion to Intervene as of right under Rule 24(a)(2).

Petitioners' motion to intervene called upon the District Court to exercise its judgment balancing

> [T]he various components of the Rule...read also in the context of the particular statutory scheme that is the basis for the litigation and with an eye to the posture of the litigation at the time the motion is decided...common sense demands that consideration also be given to matters that shape a particular action or particular type of action.

3B, James Wm. Moore, Moore's Federal Practice, Second Edition, ¶24.07[1] at pp. 24-44 citing International Paper Co. v.

Town of Jay, 887 F.2d 338, 343-44 (1st Cir. 1989); United States v. Hooker Chems.& Plastics, Inc., 749 F.2d 968, 983 (2nd Cir. 1984); United States v. Texas E. Transmission Corp., 923 F.2d 410, 413 (5th Cir. 1991); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 48 L.Ed.187, 96 S.Ct. 1684 (1976). Decisions of other Courts of Appeals as well as those of the Eleventh Circuit acknowledge that among the wide variety of situations in which a District Court is asked to allow intervention under Rule 24(a)(2), flexibility is necessarily a part of the application of the Rule. Under the rule, obvious among the factors the District Court is to consider are "the interests of the original parties and the interest of judicial administration." See 3B, Moore's Federal Practice, Second Edition, ¶24.07 [1], p. 24-45. Since an application for intervention under Rule 24(a)(2) cannot always be determined by the application of simple black letter law, the factual situation of each application must be carefully examined to determine whether or not the requirements of the Rule have been satisfied. See Moore's Federal Practice, Second Edition, ¶24.07[1] at pp. 24-44 to 24-45, quoting United States v. Texas E. Transmission Corp., 923 F.2d 410, 412 (5th Cir. 1991):

> [I]ntervention may be sought in a wide variety of situations involving unique facts and procedural

> postures ....Because Rule 24 attempts to address all of these situations, the facts and procedural posture of each case are important and it is often true that general rules and past decisions cannot provide uniformly dependable guides.

See Missouri-Kansas Pipeline Co. v. United States of America, 312 U.S. 502, 506, 85 L.Ed. 975, 980, 61 S.Ct. 666, 668 (1941) where Justice Frankfurter, commenting upon Rule 24(a) states:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court.

In Izumi Seimitsu, supra, the Supreme Court in dismissing certiorari as improvidently granted, held separately in its opinion with the intervention question and stated (Izumi Seimitsu Kogyo v. U.S. Philips Corp., 510 U.S. 27, 126 L.Ed.2d 396, 403, 114 S.Ct. 425, 428 (1993)):

> While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case. Should we undertake to review the Court of Appeals' decision on intervention, it is unlikely that any new principle of law would be enunciated, as is evident from the briefs of the parties on this question. As we said in Yee, Rule 14.1(a) helps us ['t]o use our resources most efficiently' by highlighting those cases that will

> enable us to resolve particularly important questions.' (Citation omitted.)

The Court of Appeals disposition of Petitioners' motion to intervene is simply not such a question. That is to say, as the Supreme Court in Izumi stated, it would not review the Court of Appeals conclusion that "Izumi's interest in preserving the judgment for collateral estoppel purposes was insufficient to provide standing." 126 L.Ed.2d at p. 403 and at p. 400, 114 S.Ct. 428 and at p. 426.

And see Appalachian Power Co. v. Amer. Institute of Cert. Public Accountants, 361 U.S. 83, 4 L.Ed.2d 30, 32, 80 S.Ct. 16, 18, Opinions of Justices in Chambers:

> But ordinarily an application by a District Court of the Rules of Civil Procedure, when affirmed by the Court of Appeals will not be reviewed by this Court.

This is particularly true where, as here, the question is one that concerns the judgment of the District Court in relation to a particular set of facts.

Rule 24(a)(2) permits intervention:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action.

The Court of Appeals correctly determined that:

> The transactions that were the subject of the class action proceeding are the debenture exchange transactions. ABC admits that it is not a real party in interest as to those transactions. Purcell, supra at 1512; Appendix of Petitioners at 8a.

Indeed, Petitioners never asserted an interest in the subject matter of the Purcell litigation but, to the contrary, Petitioners took the position that:

> ...ABC does not seek to litigate the merits of the Purcell dispute and did not ground its intervention motion on the premise that it had an interest in the contested property rights....(ABC) seeks intervention to assert a significant independent interest only in the judicial disposition of the verdict and the judgment entered upon the verdict.

See "Memorandum of Law of Appellants American Broadcasting Companies, Inc. and William H. Willson in Opposition to Motion of Appellees Purcell, et al., Smith, et al. and Chelling, et al. to Dismiss Appeal," filed in the Court of Appeals, December 12, 1994, p .17.

The decision of the District Court in applying Rule 24(a)(2) required consideration of all the competing and relevant interests raised by Petitioners' application for intervention. At the time Petitioners moved for intervention, these three consolidated class actions, consisting of a total of 3,711 Class

Members had reached the settlement stage after 5 years of litigation, including an 11 day jury trial and two appeals. Petitioners' intervention would work substantial prejudice to the original parties to the lawsuit, and effectively vitiate the settlement agreement through which Purcell Plaintiffs were to receive payments. See Purcell, supra, 85 F.3d at 1514; Appendix of Petitioners at 11a. Thus, the Court of Appeals and the District Court each had to examine the factual situation of Petitioners' application for intervention. Because under Rule 24(a)(2), intervention may be sought in a wide variety of situations the facts and procedural posture of this case required an exercise of judgment by both courts below. Faced with a settlement which resolved all of the litigation by the parties in the original Purcell action, the District Court had to consider Petitioners' claim of a "significantly independent interest," an interest not in the merits or substance of the Purcell litigation, but a collateral interest in a related libel case. The District Court therefore had to decide whether to allow an intervention substantially prejudicial to the original parties to the litigation where the interest claimed for intervention was far afield from the substance of the original litigation. See 7C C.A. Wright, et al., Federal Practice & Procedure, Second Edition, §1904 at pp. 239-40. The Court of Appeals held that:

> . . . measured against the Rule 24 requirement that it be a 'direct substantial, legally protectable interest' ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right. Broadening the right of intervention to cover the circumstances of this case would not only be unprecedented, it would also run counter to the public policy values that are furthered by permitting parties to settle the case without the interference of interlopers. (Citation deleted.)

Purcell, supra, 85 F.3d at 1513; Appendix at 9a.

CONCLUSION

This case involves merely a decision by the Court of Appeals that Petitioners' interest in preserving a verdict and judgment for collateral estoppel purposes in a separate libel action does not qualify as a direct, substantial and legally protectable interest required by Rule 24(a)(2). Though there were over 7,700 limited partners who had received debentures in the exchange transaction, Petitioners at no time owned debentures, nor did they have any interest in the transaction which was the subject of the action. U.S. Bancorp, on which Petitioners rely, involved the preservation of precedent of national importance and the attempted vacatur (to which a party to the action objected) of a final judgment. The judgment in the

instant case was not a final judgment at the time the District Court entered its order of vacatur. In any event, the Court of Appeals, by ruling that Petitioners did not qualify under Rule 24(a)(2) to intervene as of right, expressly did not reach any U.S. Bancorp issue.

Respondents Purcell request that the petition be denied.

Dated: Seattle, Washington
August 22, 1996

Respectfully submitted,

Ray Siderius
C.R. Lonergan, Jr.
SIDERIUS LONERGAN
500 Union St., Ste. 847
Seattle, Washington 98101
206/624-2800
Counsel of Record for Respondents Purcell and Class.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 11 1994
MIGUEL J. CORTEZ
CLERK

NO. 93-4825

JOHN D. PURCELL; DEBRA K. PURCELL;
DOUGLAS K. GROTHE; JOLENE M. GROTHE;
HOWARD HELTON, et al.,

Plaintiffs-Appellees,

versus

BANKATLANTIC FINANCIAL CORP.;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 23, CORP.,

Defendants-Appellants,

SCOTT G. KRANZ; FRANK V. GRIECO;
FIRST EQUITY CORP. OF FLORIDA,

Defendants.

- - - - - - - - - - - - -

WILLIAM A. SMITH;
ELSE M. SMITH, husband & wife;
RICHARD W. HAGEDORN;
ETHEL V. HAGEDORN, husband & wife;
FLOYD G. LAMAR, et al.,

Plaintiffs-Appellees,

versus

BANKATLANTIC FINANCIAL CORP., a
Florida corporation;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 24, CORP., a
Florida corporation,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA,
a corporation,

Defendant.

- - - - - - - - - - - - -

TIMOTHY J. CHELLING,

Plaintiff-Appellee,

versus

BANKATLANTIC FINANCIAL CORPORATION;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 21, CORP.,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

NO. 93-4879

JOHN D. PURCELL,

Plaintiff,

DEBRA K. PURCELL; DOUGLAS K. GROTHE;
JOLENE M. GROTHE; JANE DOE GROTHE;
HOWARD HELTON, DIANA HELTON; JANE DOE
HELTON; WILLIAM E. WALL; SHIRLEY A. WALL,

Plaintiffs-Appellants,

versus

BANKATLANTIC FINANCIAL CORP.;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 21 CORP.,

Defendants-Appellees,

SCOTT G. KRANZ; FRANK V. GRIECO;
FIRST EQUITY CORP. OF FLORIDA,

Defendants.

- - - - - - - - - - - - -

WILLIAM A. SMITH,
ELSE M. SMITH, husband & wife;
RICHARD W. HAGEDORN,
ETHEL V. HAGEDORN, husband & wife;
FLOYD G. LAMAR,
VICTORIA LAMAR, husband & wife;
KENNEDY, HARRY B.,
KENNEDY, MARGARET M., husband & wife;
HERMANN, BERNARD E.; JANE DOE SMITH;
JANE DOE LAMAR; JANE DOE KENNEDY;

Plaintiffs-Appellants,

versus

BANKATLANTIC FINANCIAL CORP., a
Florida corporation;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 24, CORP., a
Florida corporation,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

- - - - - - - - - - - - -

TIMOTHY J. CHELLING,

Plaintiff-Appellant,

versus

BANKATLANTIC FINANCIAL CORPORATION;
ALAN B. LEVAN;
I.R.E. ADVISORS SERIES 21, CORP.,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

Appeal from the United States District Court for the
Southern District of Florida

Before KRAVITCH, BIRCH and DUBINA, Circuit Judges.

B Y T H E C O U R T:

These appeals are DISMISSED for lack of jurisdiction. The district court's Final Judgment for damages and post-judgment orders are not final and appealable because the court has not disposed of the plaintiffs' equitable claim for rescission. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); Williams v. Bishop, 732 F.2d 885 (11th Cir. 1984) (per curiam). The parties may seek review of all of the district court's rulings in these cases once the court has disposed of the rescission issue.

No. 96-124

(3)

Supreme Court, U.S.
FILED
SEP 3 1996
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Of Counsel:

SUSAN BUCKLEY
ANNE B. CARROLL
CAHILL GORDON & REINDEL
New York, New York

RAYMOND V. MILLER
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN, P.A.
Miami, Florida

ALAN N. BRAVERMAN
STEPHANIE S. ABRUTYN
AMERICAN BROADCASTING COS., INC.
New York, New York

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

Rule 29.6 Statement

American Broadcasting Companies, Inc. is a wholly owned subsidiary of ABC Holding Company, Inc., a wholly owned subsidiary of Capital Cities/ABC, Inc., which, in turn, is a wholly owned subsidiary of The Walt Disney Company.

TABLE OF CONTENTS

PAGE

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONERS 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

PAGE

Aetna Casualty and Surety Co. v. *Home Insurance Co.*, 882 F. Supp. 1355 (S.D.N.Y. 1995) 5

Agee v. *Paramount Communications, Inc.*, No. 93 Civ. 6348 (CBM), 1996 WL 391868 (S.D.N.Y. July 11, 1996) 5

Bailey v. *Blue Cross/Blue Shield*, 878 F. Supp. 54 (E.D. Va. 1995) 5

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 3

City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 8

Espirito Santo Bank v. *Kyriakides* (*In re Kyriakides*), 177 B.R. 1020 (Bankr. S.D. Fla. 1995) 5

Krowlikowski v. *Volanti*, No. 95 C 1254, 1996 WL 451307 (N.D. Ill. Aug. 7, 1996) 5

Montana v. *United States*, 440 U.S. 147 (1979) 3, 3n

Parklane Hosiery Co., Inc. v. *Shore*, 439 U.S. 322 (1979) 3

Stolz v. *American International Life Assurance Co.*, 922 F. Supp. 435 (W.D. Wash. 1996) 5

United States v. *Williams*, 504 U.S. 36 (1992) 8

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994) .....*passim*

PAGE

Rules:

Fed. R. Civ. P.

Rule 24(a) 2, 4

Rule 50 7

Rule 59 7

Rule 60 ..... 5n, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-124

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

We emphasize at the outset what cannot be disputed.

The practical effect of the circuit split as to intervention is to deny in the Eleventh Circuit and elsewhere to third parties with the most direct interest in the preclusive impact of duly entered judgments the opportunity even to be heard to oppose settlement-dictated vacatur of those judgments. This case offers the best illustration of the worst result of that rule of law. Yet none of the respondents chooses to address the point. Here, the "settlement" was nothing but a purchase by BFC of the full judgment entered against it in return for the vacation of that judgment. The court of appeals was unambiguous

about this. App. 4a. So, now, is BFC, which confirms that "the class wanted to settle for the amount of the verdict" and that BFC itself "was willing to settle for that amount and forego its right to an appeal," but only in return for the vacation. BFC Opposition Brief ("BFC Br.") at 7, 9. Since it is undisputed that if the principles set forth by this Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994), do apply in this case, the vacatur here cannot be sustained as a matter of law, the peculiarly harmful impact of the Court's ruling on intervention is all the more evident.

Respondents who prevailed in the securities fraud action below (collectively "Purcell") focus the bulk of their argument on an effort to show that this case is not worthy of this Court's review by urging (as their co-respondents do not) that there is no significant split among the circuit courts with respect to the kind of "interest" required for intervention of right. Purcell Brief in Opposition ("Purcell Br.") at 12-22. In doing so, they succeed only in underscoring the elusiveness of the principles used by lower courts to determine the necessary level of interest, the utter unpredictability of results, and the consequent need for this Court's guidance on the question. More important, they do not and cannot refute the reality that the Eleventh Circuit as well as other courts of appeals consistently limit intervention of right to "real parties in interest," while others, such as the D.C. and Ninth Circuits, consistently apply far less demanding standards under Rule 24(a). *See* ABC Petition at 16-21.

In contrast, BFC offhandedly comments that the circuit conflict "may be more linguistic than real," BFC Br. at 21, but does not take issue with ABC's analysis of the division among the circuits. Rather, BFC's challenge on the Rule 24(a) question is largely confined to the circular assertion that the stringent test used by the Eleventh Circuit to deny intervention to ABC was correct because ABC's interest in the collateral estoppel effect of the *Purcell* verdict and judgment on

the *Levan* libel suit ought not to be held sufficient to justify intervention to preserve that effect.

In the same vein, both respondents try to avoid scrutiny of the ruling below by asserting that this case is too mundane for review. BFC calls the Court of Appeals' holding a "garden variety intervention decision" that does not implicate "any issues of broad public interest." *Id.* at 20. This is, at bottom, an argument that the preclusive impact of a prior disposition, though concededly powerful enough to terminate a second litigation altogether, is nonetheless too insignificant to undergird intervention, let alone to warrant this Court's time and attention. But such a position cannot begin to be squared with this Court's past pronouncements about the significance of the preclusion doctrine in general, *see Montana* v. *United States*, 440 U.S. 147, 153-54 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971), and of the offensive use of non-mutual collateral estoppel in particular, *see Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322 (1979).[1]

BFC urges that the creation of an "absolute right of intervention" would produce an "outlandish rule of sweeping and unprecedented impact." BFC Br. at 23. These professed fears could have some basis if (as is not the case) ABC were asking

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[1] As this Court stated in *Montana*, explicating the principles of *Parklane Hosiery*, under the doctrine of collateral estoppel,

> once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . . *Application of [the] doctrine[] is central to the purpose for which civil courts have been established*, the conclusive resolution of disputes within their jurisdictions. . . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. at 153-54 (1979) (citations omitted) (emphasis added).

the Court to determine that Rule 24(a) authorizes intervention as of right prior to or during a trial itself, or even after a trial, based on the mere *possibility* that the prospective intervenor might somehow be affected by its outcome.[2] That, of course, is not what ABC sought to do or ever maintained it was entitled to do. ABC does not suggest that district judges should be stripped of their authority to determine when a claimed preclusion interest is so remote that intervention to protect that interest is unsustainable. Here, however, there is no question of remoteness at all. Neither respondent even takes issue with the conclusion of the Court of Appeals that but for the vacatur of the *Purcell* verdict and judgment, the libel action against ABC would properly have been dismissed as, indeed, the Magistrate had recommended prior to ABC's motion to intervene.

Respondents take still another tack when they maintain that *U.S. Bancorp* is "fundamentally irrelevant" to, or "readily distinguishable" from, this case because it addressed vacatur at the appellate court, rather than the district court, level. BFC Br. at 16-19, 21; Purcell Br. at 8-10. Nothing in the text of

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[2] Purcell's suggestion that ABC avoided intervening in *Purcell* prior to the trial only so that it would not be precluded from defending the libel case, Purcell Br. at 5 n.3, not only lacks factual basis but is wholly without legal substance: how could ABC have intervened at all prior to the entry of a judgment (let alone prior to the trial itself) on a theory so conjectural it amounts to nothing more than the possibility that *some* jury verdict could conceivably be of *some* preclusive benefit to it? In contrast, BFC suggests that ABC only sought to intervene in *Purcell* to avoid defending the broadcast. BFC Br. at 19 n.3. The same could be said of any party seeking to assert a collateral estoppel defense. In a similar vein, BFC's repeated quotations from and citations to the *Levan* Magistrate's views on the broadcast, BFC Br. at 7-8, are not only irrelevant but also wholly improper. That part of the Magistrate's first Report and Recommendation was referred back to the Magistrate for reconsideration by the district court, Order on Defendants' Objections to the Magistrate's July 22, 1993 Report and Recommendation, August 31, 1994, at 1, notwithstanding BFC's disingenuous suggestion to the contrary, BFC Br. at 8 n.2. Upon reconsideration, the Magistrate did not see fit to repeat any of his earlier remarks. BFC App. at 19a-33a.

U.S. Bancorp lends support to so constricted a reading. Nor have federal trial courts so read it. *See, e.g., Krowlikowski* v. *Volanti*, No. 95 C 1254, 1996 WL 451307, at *2-*4 (N.D. Ill. Aug. 7, 1996); *Agee* v. *Paramount Communications, Inc.*, No. 93 Civ. 6348 (CBM), 1996 WL 391868, at *1-*3 (S.D.N.Y. July 11, 1996); *Aetna Casualty and Surety Co.* v. *Home Insurance Co.*, 882 F. Supp. 1355, 1356-58 & nn.5, 8 (S.D.N.Y. 1995); *Bailey* v. *Blue Cross/Blue Shield*, 878 F. Supp. 54, 55-56 (E.D. Va. 1995); *Stolz* v. *American International Life Assurance Co.*, 922 F. Supp. 435, 435-37 (W.D. Wash. 1996); *Espirito Santo Bank* v. *Kyriakides* (*In re Kyriakides*), 177 B.R. 1020, 1021 (Bankr. S.D. Fla. 1995). As one of these courts put it,

> [B]y conditioning the waiver of an appeal upon the vacatur of the decision in this matter, the parties have placed in issue the integrity of the judicial process. . . . If [the losing defendant] wishes to avoid the adverse effects of an unfavorable decision, the better method to employ here is judicial review by the [Court of Appeals].

Aetna Casualty, *supra*, 882 F. Supp. at 1358.[3]

Other attempts by BFC and Purcell to show that their vacatur lies outside the realm of *U.S. Bancorp's* concerns fail as well. The assertion that the *Purcell* settlement should stand because its terms are advantageous to both parties, BFC Br. at

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[3] Indeed, if respondents are to be heard seriously to maintain that *U.S. Bancorp* has no application when a district court (as opposed to an appellate court) is asked to vacate a judgment in a case, that counsels in favor of the exercise of this Court's jurisdiction to provide guidance on the issue. To be sure, as respondents urge, the district courts continue to have power under Rule 60(b) to vacate judgments under the standards set forth in the Rule, but none of the respondents has even suggested that there were such grounds in this case. Thus, respondents' argument boils down to the notion that even if a Rule 60(b) motion would not lie before a district court, *U.S. Bancorp* still does not apply and would permit verdicts and judgments to be purchased and sold at will so long as the deals are effectuated before appeal.

5-7, Purcell Br. at 4-7, simply misses the point of *U.S. Bancorp*. Parties presumably always believe that settlements to which they agree are in their interest; they would not otherwise agree to settle. *U.S. Bancorp* does not say that vacatur dictated by settlement is improper only where the other settlement terms are unfair or foolish. It holds that in the absence of "exceptional circumstances"—circumstances that do *not* include the desire of the loser to erase a disagreeable ruling by manipulating the judicial process—parties to a litigation may not use settlement as a means to expunge judgments from public records and thus to usurp the public benefit of those judgments. 115 S. Ct. at 393. Indeed, it is precisely because none of the respondents can demonstrate—or have even attempted to demonstrate—the existence of exceptional circumstances here that they argue that this Court's decision in *U.S. Bancorp* simply does not apply to district courts at all.

BFC further urges the Court to deny the petition based on its assertion that it should have prevailed on the merits of the *Purcell* securities fraud case at trial and would have prevailed on appeal. BFC Br. at 2-7. Whatever the likely accuracy of these hindsight assessments, and however deeply BFC professes to believe that it "simply could not live with the erroneous verdict," *id.* at 6-7, it is at the core of *U.S. Bancorp* that the remedy of a party dissatisfied with a trial court disposition is *appeal*, not vacatur.[4]

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[4] BFC's efforts to disparage the *Purcell* verdict and judgment by citation to oral comments of the *Purcell* judge in informal post-trial exchanges with counsel and to the vacatur order which BFC's own counsel wrote can hardly be credited. For one thing, the court made numerous other oral remarks in post-trial hearings wholly inconsistent with those on which BFC relies. The judge stated, for example, that "[o]f course, the people who voted no read the prospectus and immediately saw [w]hat this was voted no because of the time value of money. . . . Who wants something payable in 20 years? I would rather take less now."; and that "if I were given the option of taking $25 million which belonged to somebody else and giving them a note for $30 million say payable in 20 years with no interest due until the note is due, I think . . . I would take

BFC's contention that the principles of *U.S. Bancorp* can have no bearing here because the judgment entered by the *Purcell* court on the jury verdict was an "interlocutory order," BFC Br. at 18-19, is equally unavailing. While there is no doubt that as a general matter the discretion of district courts to vacate their own orders is broad, BFC cites no authority—and petitioners are aware of none—which countenances the vacation by a district court of a jury verdict of liability or a judgment entered upon such a verdict outside the framework of a motion made pursuant to Rule 50 (judgment as a matter of law), Rule 59 (new trial) or Rule 60 (relief from judgment or orders).[5] BFC's suggestion that the vacatur here fell within the district court's power to afford relief from a judgment in the interest of justice is simply another way of saying that a federal court may vacate a judgment, regardless of its value to third parties, only because one of the parties insists upon vacatur as a condition of settlement.[6] But that is the very conclusion rejected by *U.S. Bancorp*.

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the $25 million and sign the note for 30 million, and furthermore, it's not backed by anything . . . and I think that's what any juror has to look at and has to say that's just not a good deal." R2-359-66, 101. Most importantly, in its post-trial written order, the district court ruled that "[t]his Court cannot say that the jury's verdict was irrational or without factual and evidentiary foundation, and has accordingly denied Defendants' motions for judgment as a matter of law and in the alternative for a new trial." App. 37a. Where a post-trial motion for judgment as a matter of law has been denied and no extraordinary circumstances intervene, it is specious to argue—as respondents do—that vacatur is appropriate on the basis of a potpourri of oral comments by the district court during the proceedings.

[5] Here, the first two motions had been denied by the district court and BFC neither had grounds for nor made the third.

[6] The fact that the Eleventh Circuit found the *Purcell* judgment to be insufficiently final for purposes of appeal—because it neglected to provide for the rescissionary relief which the class had sought along with money damages—did not figure at all in its subsequent decision that ABC was not entitled to intervene in *Purcell*. In fact, the Court of Appeals explicitly acknowledged that the *Purcell* judgment *would* collaterally estop the libel suit were it not vacated. App. 11a.

There remains only respondents' suggestion that certiorari should be denied because the applicability of *U.S. Bancorp* to this case was not expressly passed upon by the Court of Appeals. *See* BFC Br. at 14-15; Purcell Br. at 8. That contention has no impact at all on the need for this Court to resolve the outstanding circuit division as to when intervention as of right should be permitted. It is true that the Eleventh Circuit stated that because it had determined that ABC's intervention was properly denied, it would not reach the merits of ABC's argument regarding the propriety of the vacatur. App. 6a. Yet given the express basis of the decision below—the "insubstantial" nature of ABC's interest and the "public policy values . . . furthered by permitting parties to settle a case without the interference of interlopers," App. 9a—the Court of Appeals did not so much fail to "reach" *U.S. Bancorp* as to *reject* that decision as a factor to be weighed in this case.

The applicability of *U.S. Bancorp* to this case was pressed by ABC below and fully briefed by the parties. To the extent respondents are hinting that the absence of any explicit consideration of *U.S. Bancorp* in the Court of Appeals' opinion below presents some jurisdictional or prudential bar to this Court's review, they are mistaken. *See, e.g., United States* v. *Williams*, 504 U.S. 36, 41-42 & n.2 (1992); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 3, 1996

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

Of Counsel:

SUSAN BUCKLEY
ANNE B. CARROLL
CAHILL GORDON & REINDEL
New York, New York

RAYMOND V. MILLER
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN, P.A.
Miami, Florida

ALAN N. BRAVERMAN
STEPHANIE S. ABRUTYN
AMERICAN BROADCASTING COS., INC.
New York, New York

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No. 96-124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,
Petitioners,
v.
BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF BANKATLANTIC FINANCIAL CORPORATION AND ALAN LEVAN

Of Counsel:
BRADFORD SWING
ALAN H. FEIN
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
Miami, Florida

EUGENE E. STEARNS
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
Suite 2200, Museum Tower
150 West Flagler Street
Miami, FL 33130
(305) 789-3200
Counsel of Record for BankAtlantic Financial Corporation and Alan B. Levan

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

63 pp

QUESTION PRESENTED

Petitioners have framed their questions based upon an erroneous version of the facts. The appropriate question is:

> May a non-party whose only interest in a case is a potential collateral estoppel effect intervene as of right in that case in an attempt to prevent a district court from setting aside its own prior interlocutory order, an action necessary to effectuate a settlement agreement between the parties reached after a jury verdict but prior to entry of a final, appealable judgment?

RULE 29.6 STATEMENT

The Respondent BankAtlantic Financial Corporation is now known as BFC Financial Corporation, which is the largest shareholder in BankAtlantic Bancorp, Inc., which in turn wholly owns BankAtlantic, a Federal Savings Bank.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF THE CASE	3
A. The Underlying *Purcell* Class Action	3
B. The Trial Judge Enters An Interlocutory Order	5
C. The Trial Court Encourages Settlement	5
D. BFC Files A Defamation Action Against ABC	7
E. ABC Seeks Intervention To Block The Settlement	8
F. The Hearing To Approve Class Settlement	9
G. The Court Finds The Settlement Fair, Reasonable And Adequate	10
H. The Magistrate's Report In *Levan* Is Referred Back	12
I. The Magistrate's Second Report And Recommendation In *Levan*	13
J. The Eleventh Circuit's Decision In This Case	14
REASONS FOR DENYING THE WRIT	16
A. *U.S. Bancorp* Does Not Apply To This Case	16
B. ABC Had No Basis To Intervene In The *Purcell* Class Action	19
CONCLUSION	24

TABLE OF AUTHORITIES

Cases Page

Athens Lumber Co., Inc. v. Federal Elections Commission, 690 F.2d 1364 (11th Cir. 1982) 21
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 21
Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989) 15
Clarendon Ltd. v. Nu-West Industries, Inc., 936 F.2d 127 (3d Cir. 1991) 17-18
County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) 21-22
Donaldson v. United States, 400 U.S. 517 (1971) .. 21, 22
In re Memorial Hospital, 862 F.2d 1299 (7th Cir. 1988) 18
In re United States, 927 F.2d 626 (D.C. Cir. 1991) 18
Izumi Seimitsu Kogyo Kabushiki Kaisa v. U.S. Philips Corp., 114 S.Ct. 425 (1993) 17, 19-20
Mateo v. M/S Kiso, 805 F.Supp. 761 (N.D. Cal. 1991) 18
Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) 22
Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 21
U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994) .....*passim*
United States v. Jerry, 487 F.2d 600 (3d Cir. 1973) 18
Virginia Bankshares v. Sandberg, 111 S.Ct. 2749 (1991) 10

Rules

Fed.R.Civ.P.
Rule 24 22
Rule 60(b), Advisory Committee Notes, 1946 Amendment 18

Other

Judicial Code
28 U.S.C. § 2106 17

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No. 96-124

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION OF BANKATLANTIC FINANCIAL CORPORATION AND ALAN LEVAN

Respondents, BankAtlantic Financial Corporation ("BFC") and Alan Levan ("Levan") request that the petition for writ of certiorari be denied. The facts are not as ABC states them. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994) has nothing to do with this case. Moreover, ABC had no basis, whether as a matter of right or permissively, to intervene in the *Purcell* class action litigation for the purpose of preventing a settlement between the parties to that litigation.

OPINIONS BELOW

ABC has not included in its appendix the two Reports and Recommendations of the Magistrate Judge in the *Levan* libel case that are referenced in ABC's petition to this Court. They are appended to this brief.

STATEMENT OF THE CASE

A. The Underlying *Purcell* Class Action

The plaintiffs in the underlying class action (the "*Purcell*" class action) were investors in three real estate limited partnerships. R1-1. Each of the *Purcell* investors had voted against a proposed exchange transaction in which the assets of the three partnerships were exchanged for corporate debentures issued by BFC, a parent of BankAtlantic, a Federal savings bank. R1-1. As a result of the exchange transaction, BFC ended up with the assets of the partnerships, including real estate, mortgages and cash, but it also ended up with the liabilities of the partnerships, including mortgage debt, payables and environmental liabilities. R10-343-1106-1112. The exchange transaction was consummated, despite the negative votes of the *Purcell* plaintiffs, because a majority of the limited partners in each partnership voted in favor of it.

In connection with the proposed exchange, BFC had prepared and circulated, after review by the Securities and Exchange Commission, a detailed offering circular that was required to fully disclose all of the material facts that a reasonable investor would want to know about the transaction. R1-1-Ex. B. The prospectus, in fact, disclosed in considerable detail the terms and conditions of the exchange, the risks of the exchange, the possible adverse events that could have occurred, and an opinion of fairness by an investment banking firm. R1-1-Ex. B.

The prospectus also included a statement that BFC and its principals believed the transaction to be fair, although BFC qualified that opinion of fairness in a number of

particulars. Among other things, BFC noted that its opinion of fairness should be considered in light of its fully disclosed conflicts of interest and economic interest in the transaction. R1-1-Ex. B. at 5, 13, 35, 47 and 49. Moreover, BFC stated that in making its determination of fairness, it did not consider that a market would ever develop for the BFC debentures. R1-1-Ex. B. at 47.

BFC's fairness statement became the crux of the *Purcell* litigation. Initially, the plaintiffs had brought a series of contract, common-law, and securities claims allegedly arising out of the exchange. R-1-1. By the time the case went to the jury, however, only one discrete issue survived: Did BFC and Levan violate the disclosure requirements of federal securities laws by opining in the offering circular that the transaction was fair when in fact they believed otherwise?

The essential argument advanced by the plaintiffs as to the alleged unfairness of the transaction was that the value of the debentures given in the exchange was neither the expressly stated face amount of the notes nor some lesser amount reduced to present value, but, instead, was the market value for the BFC debentures in a market that never developed. R6-339-263-265; R9-342-885. Plaintiffs argued to the jury that since the debentures had little or no "market value," as they described it, the exchange could not possibly have been "fair" and BFC must have known that "fact" even before stating otherwise in the offering circular. Plaintiffs advanced this theory despite full and complete disclosure throughout the offering circular of the possibility that no market would develop for the debentures, a disclosure that is conspicuously and repeatedly stressed in the first three pages of the circular. R1-1-Ex. B. In this manner, what had been pleaded as a "disclosure" case under the securities laws became instead a case in which the jury was simply allowed to determine if, with the benefit of hindsight, they thought the transaction was fair.

The jury found that BFC and Levan falsely stated that they believed the transaction to be fair and found that the plaintiffs were damaged by that false opinion. They returned a verdict in favor of the class of plaintiffs, awarding them a total of $8 million in damages (based on a jury instruction which stated that such a verdict would have the effect of cancelling the outstanding debt owed by BFC to these same plaintiffs, a debt in the face amount of $16.5 million plus interest in excess of 10%). R2-292.

Put most charitably, plaintiffs' case to the jury was deficient of relevant evidence. For example, although no one could argue that essential elements of a securities violation are materially false or omissive statements that were relied upon to cause a loss, not one single witness testified that a single voter who approved the transaction relied upon Mr. Levan's opinion of fairness in voting for the transaction or thought it was material. No evidence was offered that any investor, much less enough investors to have swayed the vote, relied upon the heavily qualified opinion of fairness of BFC and Levan or thought it was material. Indeed, to the extent there was any evidence about this element of a securities claim, the plaintiffs testified that they would never have relied upon or considered Levan's opinion of fairness to be material because Mr. Levan admitted in the disclosures that he had conflicts of interest, because he said he was not objective, and because he said, that in giving his opinion, he was not considering the existence of any market for the debentures. R9-342-899. Each of the testifying plaintiffs expressly stated that they formed their opinion to vote against the proposed exchange by reading the plain language in the prospectus disclosing the risks and conflicts. R9-342-722, 899; R6-339-206, 218; R12-345-1460.

In addition, the plaintiffs offered no evidence that Alan Levan and BFC did not believe the transaction to be fair. Instead, they simply offered evidence that *they* thought the deal was unfair because it offered long-term debentures in exchange for their limited partnership interest in real

estate. The jury was no doubt swayed by the repeated testimony of several elderly investors that at their age, they did not like the long-term aspect of the debentures, including the comment of one witness that "I don't even buy green bananas any more." R3-447-2-4.

Not only was the jury verdict unusual given the absence of a proper evidentiary foundation, its practical effect was also unique. Although the reputations of BFC and Mr. Levan were no doubt sullied by an adverse verdict in this securities case, the practical result of the case as a whole—finding liability for $8 million while extinguishing liability in the face amount of $16.5 million plus interest running at well over 10%—was of substantial economic benefit to BFC. R2-345-1555.

B. The Trial Judge Enters An Interlocutory Order

After the jury verdict, but before resolution of the post-trial motions and several other pending issues, the court entered an order based upon the verdict, which order was erroneously entitled "Final Judgment." R2-314. BFC believed that the order was not in fact a final judgment because of the other substantial issues that were still left to be resolved by the parties and the court. Among the other matters that had not yet been ruled upon by the trial judge, there remained complex issues on how to give effect to the jury instruction that a verdict for damages in favor of the plaintiff required a return of the outstanding debentures. R2-292. Given the title of the interlocutory order, however, BFC felt compelled, in an abundance of caution to appeal the order. R2-369. On February 11, 1994, the Eleventh Circuit confirmed BFC's belief by formally determining that the order in fact lacked the requisite finality, and it dismissed the appeal. R2-419.

C. The Trial Court Encourages Settlement

Throughout the trial and post-trial hearings, the presiding judge pointedly remarked to counsel for the parties

about the lack of evidence supporting the verdict. The court observed that the jury's verdict "did not comply with any of the evidence" and did not "rest on solid judicial concepts." R14-379-13, 31. The court also remarked: "If I were a trier of fact I wouldn't have found this way" and "I wouldn't be surprised at all if this case got turned around." [1] R15-409-31, 32.

The court's comments regarding the lack of support for the verdict, coupled with the prospect of more litigation in the district court (and likely appeals), did in fact prompt the parties to structure a settlement. Settlement was also facilitated by very unusual circumstances: The verdict of $8 million was actually millions of dollars *less* than the amount which BFC consistently maintained was owed to the class. R2-345-1555. Indeed, the settlement provided for the elimination of corporate debt reflected in the debentures of $16.5 million, earning interest at well above market. And, as the district court observed, the verdict was based upon the jury's erroneous conclusion that BFC violated the securities laws. R14-379-13, 31; R3-447-3, 4.

The ground for a settlement was thus established. BFC was not opposed to paying the $8 million—indeed, it recognized its obligation to pay much more—but BFC and Levan simply could not live with the erroneous ver-

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[1] Having made these telling observations, why did the trial court deny post-trial motions? The court addressed this issue succinctly:

> There are certainly enough legal issues in this case, and I have already denied the post-trial motions for remittitur and judgment NOV. *My experience with the Eleventh Circuit is that they don't like trial judges tampering with jury verdicts. It's all right for them to do it, but they don't want us to do it,* so whether they do it or not, that's—we will find out, but they certainly have got enough legal issues to consider *and I wouldn't be surprised if they did something with it,* but every time I do something they say you are just disagreeing with the jury.

R14-379-4 (emphasis added).

dict, particularly because their business is in the highly regulated area of banking. The class wanted to settle because it knew that the verdict was subject to reversal on appeal, having been expressly told by the presiding judge that the judgment stood on very shaky legal grounds. In sum, the class wanted to settle for the amount of the verdict, and BFC was willing to settle for that amount and forego its right to an appeal if the erroneous jury verdict and interlocutory order were vacated.

D. BFC Files A Defamation Action Against ABC

In 1991, representatives from ABC's news magazine "20/20," including William H. Willson, a petitioner here, began to pursue a story about "real-estate roll-ups." BFCApp. at 1a. On November 29, 1991, prior to the trial in *Purcell*, the story, entitled "Too Good to Be True," was broadcast. BFCApp. at 2a. The story discussed so-called "roll-ups" in which the real estate holdings of partnerships are exchanged for some other investment. BFCApp. at 2a. BFC's exchange transaction was deemed by ABC to be a "roll-up," and it was the purported focus of the story. BFCApp. at 2a-3a. In fact, the story was a very nasty and personal character assassination of Mr. Levan.

On February 7, 1992, BFC and Levan filed a complaint because of ABC's broadcast ("the *Levan* action"). BFCApp. at 5a. In February 1993, ABC moved for summary judgment, contending that the interlocutory order entered in *Purcell* precluded BFC from bringing its defamation action. BFCApp. at 8a. The Magistrate in *Levan* filed his first Report and Recommendation on July 22, 1993, recommending that ABC's motion for summary judgment be granted on estoppel grounds because of the so-called "final judgment" in the *Purcell* class action. BFCApp. at 18a.

In the text of his report, however, the Magistrate observed, with regard to the 20/20 broadcast, that "many

of the individual statements in the story were misleading, if not completely false," and then he listed "some of the more egregious examples." BFCApp. at 16a-17a. In that context, the Magistrate noted that ABC "took license with the facts"; that ABC used "tactics [which] allowed [them] to use Levan's own words to produce false or misleading impressions"; and that ABC utilized "reprehensible" and "crafty" editing techniques to convey false images. BFCApp. at 16a-17a. Ultimately, the Magistrate concluded that ABC's practices were "shamefully irresponsible," and that ABC "cared more about telling a good story than an accurate one." [2] BFCApp. at 17a.

E. ABC Seeks Intervention To Block The Settlement

By this point, the parties in the *Purcell* case had decided to settle. BFCApp. at 21a. So, more than five years after the *Purcell* action was commenced, and after the parties had reached settlement of the underlying litigation, ABC filed a motion for intervention to prevent the parties from consummating the settlement. R2-419. Significantly, ABC failed to request permission to file an *amicus curiae* brief to raise any public interest issues.

In its motion for intervention, ABC contended that although it was not a real party in interest in the transaction that was the subject matter of this case—the exchange transaction—it should nevertheless be allowed to intervene because it wanted to preserve for itself the interlocutory order for its own use in the *Levan* action. R2-419-6. In its memorandum, ABC briefed both the issues of intervention as of right and of permissive in-

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[2] On August 4, 1993, ABC filed objections to the Magistrate's Report and Recommendation, specifically asking the court to strike the Magistrate's blistering critique of its behavior. In fact, the Magistrate had been careful to use as examples of ABC's misbehavior facts which were not arguably at issue. On August 31, 1994, the *Levan* Court declined to grant ABC's objections. Order on Defendants' Objections to the Magistrate's July 22, 1993, Report And Recommendation.

tervention. R2-419-20. The district court, however, recognizing that ABC has no legal right at stake in this class action, rejected ABC's novel proposition and denied its motion to intervene by orders dated June 30, 1994, and July 15, 1994. R3-423; R3-429. ABC appealed the latter order on August 3, 1994. R3-441.

F. The Hearing To Approve Class Settlement

The parties in the *Purcell* action drafted a proposed settlement in June of 1994. R3-443. Then, on September 12, 1994, the district court held a settlement conference so that any party could voice objection to the terms of the proposed settlement. R16-452; R3-447.

ABC's representative attended the conference, but articulated no objections when queried by the court. Indeed, the district court began the hearing by stating: "Have there been objections or anyone want to be heard on this matter?" No one responded. R16-452-2. When the Court later noted its surprise that no one from ABC was present at the hearing, BFC's counsel pointed out that an attorney for ABC was indeed present. When invited to speak, ABC's counsel noted that "I don't believe I have standing to address this issue right now." He stated that "quite frankly, I was not prepared to address the Court on this topic today." R16-452-11.

After this exchange, the court inquired what value (be it evidentiary or estoppel) the vacated "judgment" would be to ABC. The parties explained in no uncertain terms that the vacated order would have *no* value to ABC, and that if it did have any such value to ABC, then BFC would prefer to proceed to appeal. R16-452-5-7.

G. The Court Finds The Settlement Fair, Reasonable And Adequate

Thus, on September 12, 1994, the district court, which had presided over this class action for more than five years, entered its Final Judgment Approving Settlement

And Order of Dismissal ("Final Judgment"). R16; R3-447. This was the first true "final judgment" entered in the *Purcell* action. The Final Judgment, which approved the settlement and vacated the earlier interlocutory order that had been erroneously denominated as a final judgment, includes the following findings of the court:

> 1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs. The court found during the pre-trial and trial that the disclosure document distributed to the former limited partners of the three partnerships fully and adequately disclosed the terms of the proposed transaction and the risks of the proposed transaction. The aspects of the proposed transaction that plaintiffs contended at trial to be unfair, were fully and adequately disclosed to the plaintiffs in the disclosure documents. Indeed, these plaintiffs, who each voted against the transaction, did so in large measure because what they read about the transaction in the prospectus persuaded them that it was not in their best interest.
>
> 2. The claim asserted under the principles of *Virginia Bankshares v. Sandberg*, 111 S.Ct. 2749 (1991) that, notwithstanding the adequacy of disclosure, defendants' stated opinion of fairness while allegedly believing otherwise, was a troublesome one for the court because of the adequacy of risk and conflct disclosure, because the evidence that anyone relied upon that opinion was scanty at best, and because the evidence that BankAtlantic Financial Corporation and Alan B. Levan believed the transaction to be unfair was weak, particularly since BankAtlantic Financial Corporation agreed to pay more for the former partnership assets than those assets turned out to be worth, albeit over a lengthy time period.
>
> 3. The court was also concerned that a jury might make a decision in this case not on legal principles

but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. That concern was heightened by the fact that their decision could easily have been influenced by the progression of elderly claimants who did not want twenty year debentures regardless of the fairness of the proposed transaction ("I don't even buy green bananas any more") or by the extensive adverse pre-trial publicity. In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.

5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

6. The terms of the settlement of this case are conditioned upon setting aside the verdict of the jury and the final judgment in this cause. This court has no reservation whatsoever in doing so.

R3-447-2-4.

Based on these findings, the court ruled as follows:

4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, col-

> lateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

R3-447-6-7.

The district court, very much aware of the weak underpinnings of the jury's verdict, had "no reservation whatsoever" about vacatur, or holding that it "shall have absolutely no force or effect, including, but not limited to any res judicata, collateral estoppel, or other preclusive effect whatsoever." R3-447-4, 7. While the Final Judgment was prepared by Levan's counsel and approved by Purcell's counsel, a fact which ABC argues diminishes its significance, in fact, the statements of the trial court criticizing the jury deliberations and the evidence came directly from comments made by the trial court during the trial and thereafter on the record.

Although the trial court had previously denied ABC's motion for intervention, ABC nonetheless filed an appeal of this Final Judgment as well. R3-453. By contrast, no party to the *Purcell* action appealed the Final Judgment.

H. The Magistrate's Report In *Levan* Is Referred Back

In an order dated June 6, 1994, the *Levan* court recognized that the settlement and vacatur of the interlocutory order in *Purcell* would impact whatever collateral estoppel effect the order might have had, thus eliminating the sole basis for the Magistrate's recommendation for summary judgment. R3-427-Ex. I. In its order, therefore, the *Levan* court rejected the collateral estoppel portion of the Magistrate's Report and Recommendation relating to ABC's motion for summary judgment and referred the matter back to the Magistrate for further consideration. R3-427-Ex. I.

Upon reconsideration by the Magistrate of ABC's motion for summary judgment, ABC claimed, as it does here, that the *Purcell* record established that the Final Judg-

ment and vacatur was nothing more than a "buy-off" of the verdict by BFC, and therefore violated the general principles of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 115 S. Ct. 386 (1994). BFCApp. at 24a.

I. The Magistrate's Second Report And Recommendation In *Levan*

After a thorough review of the record, the Magistrate in *Levan* filed his second Report and Recommendation on April 17, 1995, which recommended that ABC's motion for summary judgment be denied. BFCApp. at 32a. The Magistrate specifically rejected ABC's "buyout" argument, and held that, even if he had the equitable power to review the district court's decision to vacate the interlocutory order in *Purcell,* he would find that the "vacatur was proper even under the reasoning set forth in *U.S. Bancorp.*" BFCApp. at 28a.

Specifically, the Magistrate held that:

> the record in *Purcell* indicates that the vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the [trial court] expressed its belief that the judgment had weak underpinnings, was likely to be overturned on appeal, and noted the possibility of jury bias. *These findings were consistent with the court's commentary made throughout the trial.*

BFCApp. at 28a (emphasis added).

Based upon his own review of the *Purcell* record, the Magistrate further stated that "the record here shows that the *Purcell* consent decree received careful scrutiny." BFCApp. at 28a n.2. He added: "[T]he vacated judgment in *Purcell* is insufficient to preclude the litigation of any of the issues in the instant case. To hold otherwise would prevent a trial on the merits of this action based upon a judgment in a separate action which neither the

parties to the prior litigation, nor the trial judge, believes is valid." BFCApp. at 28a-29a.

The Magistrate concluded his report with the following observation:

> Finally, the undersigned believes that the public interest dictates that the merits of *Levan* be decided by a jury at trial. The First Amendment guarantees the press a right to engage in rasping and controversial discussions on all topics of public interest. However, it does not guarantee a defense against libel. So far, the public has only heard one side of the story, that is, the "20/20" broadcast. Certainly, public interest dictates that both the content of the broadcast and its production deserve scrutiny on the merits. In such cases summary judgment is not appropriate.

BFCApp. at 32a.

J. The Eleventh Circuit's Decision In This Case

Not surprisingly, the Eleventh Circuit affirmed the *Purcell* court's denial of ABC's attempt to scuttle the settlement in the underlying class action case. App. 12a. Relying upon well-established precedent, considering the very limited interest ABC had in the class action case, and recognizing the absence of any direct authority to support ABC's "unprecedented" claim for intervention, the Eleventh Circuit held "that ABC lacks sufficient interest in the class action to permit intervention as of right, and that the district court did not abuse its discretion in denying ABC's motion for permissive intervention." App. 2a.

In so holding, the Eleventh Circuit did not reject *U.S. Bancorp*. App. 6a. Instead, the court expressly stated that it did not reach ABC's arguments premised upon that decision because "we are persuaded that the district court properly denied ABC's motion to intervene," which sought intervention both as of right and permissively. App. 6a. The court explained that upon a determination the district

court's disposition of the motions to intervene was correct, its jurisdiction evaporated, citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989). App. 6a.

The Eleventh Circuit affirmed the district court's decisions on intervention for a number of reasons. Among other points, the court noted ABC's own admission that it was not a real party in interest to the exchange transactions that were the basis of the *Purcell* class action. App. 8a. Moreover, the court recognized that "ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right." App. 9a. The court also recognized that ABC's argument in support of permissive intervention—a claim that no party to the underlying class action would be prejudiced by vacating the jury verdict and the order based upon that verdict—was "woefully unconvincing." App. 11a. As the court explained, "the result ABC seeks would effectively vitiate the settlement agreement through which the plaintiffs are receiving payments from the damage award." App. 11a.

Finally, the Eleventh Circuit noted that a nonparty such as ABC "is not necessarily entitled to preserve the beneficial effects of a jury verdict and judgment, however much the nonparty may cherish those effects." App. 11a. An opportunity to preclude issues as a result of litigation involving other parties is not some absolute right. "Moreover, ABC will have its day in court. In the trial of the libel lawsuit, ABC will have an opportunity to establish in the old-fashioned way the defense it sought to preclusively establish with the class action jury verdict and judgment." App. 11a.

The jury trial of the libel action referred to by the Eleventh Circuit is presently set to begin in October 1996.

REASONS FOR DENYING THE WRIT

A. *U.S. Bancorp* Does Not Apply To This Case

This case does not raise any question about *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994), let alone some question about "enforcement" of that ruling. In its excessive zeal to manufacture an issue for this Court's review, ABC has attempted to stretch the "rationale" of *U.S. Bancorp* beyond the facts, beyond the question presented, beyond the holding, beyond the dicta, and even beyond the underlying statutory authority of that case. In short, ABC has stretched its argument well beyond the breaking point.

In the first place, the facts in *U.S. Bancorp* bear no resemblance to the facts in this case. In *U.S. Bancorp*, vacatur was sought in *this* Court, not in a Court of Appeals, and, even more importantly, not in a district court, as occurred here. 115 S.Ct. at 389. In *U.S. Bancorp*, vacatur was sought by only one of the settling parties and was *opposed* by the other settling party, totally unlike the situation in the present case. *Id.* And finally, in *U.S. Bancorp*, vacatur was sought only after appellate jurisdiction had vested, whereas no appellate court had jurisdiction in this case when the order in question was set aside by the district court. *Id.* The factual patterns in *U.S. Bancorp* and the present case could not be more dissimilar.

Dissimilar, too, are the questions presented. In *U.S. Bancorp*, the question was "whether *appellate courts* in the federal system should vacate civil judgments of subordinate courts in cases that are settled *after* appeal is filed or certiorari sought." *Id.* at 388-89 (emphasis added). In the present case, a district court set aside an interlocutory order before any appellate jurisdiction attached. Even this Court's express holding in *U.S. Bancorp*—"mootness by reason of settlement does not justify vacatur of a judgment *under review*"—does not, on its face, apply to the

present case. *Id.* at 393 (emphasis added). There was no review pending when the order on the jury verdict was set aside by the district court here.

Even the more broadly ranging discussion by this Court about the effect of its holding in *U.S. Bancorp* was strictly limited to situations where appellate review of a final judgment—totally unlike the situation in the present case —was ongoing at the time of settlement and vacatur. *Id.* at 392-93. Indeed, during the course of that discussion, the Court specifically distinguished those cases in which settlement occurred while the case was still before the district court. *Id.* at 393. For example, this Court noted that "the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal." *Id.*

Finally, the statute that supplies "the power of vacatur" (28 U.S.C. § 2106), which was the focal point of this Court's holding and discussion in *U.S. Bancorp*, has no application whatsoever to the present case. 115 S.Ct. at 389. That statute, on its face, applies *only* to "The Supreme Court or any other court *of appellate jurisdiction.*". *Id.* (emphasis added). Moreover, it is a part of Chapter 133 of Title 28, the subject of which is limited to appellate review. The statute expressly does not apply to district courts, the level of court that set aside the order in this case.

Perhaps that explains why all of the case authorities cited by ABC in an attempt to support its argument on vacatur involved only situations where appellate jurisdiction had been invoked and where *appellate* courts were being asked to set aside either appellate court decisions or lower court decisions. *See Izumi Seimitsu Kogyo Kabushiki Kaisa v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993) (where even the motion for intervention, as discussed by ABC, was filed in an *appellate* court, not the district court); *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936

F.2d 127 (3d Cir. 1991); *In re United States,* 927 F.2d 626 (D.C. Cir. 1991) (seeking vacatur of an *appellate* court decision); *In re Memorial Hospital,* 862 F.2d 1299 (7th Cir. 1988). Decisions by district courts to set aside their own orders or judgments constitute an entirely different subject matter.

The present case is not, therefore, a *U.S. Bancorp*-type case or even a potential extension of it; the present case is an entirely different situation. ABC wants this Court to simply gloss over that fact, however, and extend the holding of *U.S. Bancorp* to a territory where it has no application. In essence, ABC asks this Court to take a giant, blind leap over a grand canyon and, on new soil, firmly implant rules designed to guide appellate courts onto district court judges.

ABC asks this Court to use those inapplicable appellate court principles for the purpose of severely restricting, or nearly abolishing, the power of trial judges to alter, amend, or set aside their own orders and judgments or the verdicts of juries. Moreover, ABC wants this Court to take that giant step without any consideration of the numerous rules, statutes, and decisions covering the power of district courts to affect their own prior decisions, especially the broad power to alter or set aside interlocutory orders and judgments. *See, e.g.,* Advisory Committee Notes to the 1946 Amendment to Rule 60(b), Federal Rules of Civil Procedure ("interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires"); *United States v. Jerry,* 487 F.2d 600, 605 (3d Cir. 1973) ("so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so"); *Mateo v. M/S Kiso,* 805 F.Supp. 761, 785-86 (N.D. Cal. 1991).

Thus, even if this Court were inclined to elaborate on the vacatur issue or to consider means to enforce its hold-

ing on vacatur in *U.S. Bancorp*, this would not be the appropriate case in which to do so. To consider ABC's petition, this Court would have to extend *U.S. Bancorp* well beyond vacatur of final judgments to the point of considering, under rules designed for appellate courts, the setting aside by a district court of its own interlocutory orders. Moreover, this Court would be required to undertake its review in a case where the circuit court never even reached the issue. Needless to say, ABC's radical and thoroughly unprecedented request to throttle district court judges without even adequate consideration of the consequences should be summarily rejected.[3]

B. ABC Had No Basis To Intervene In The *Purcell* Class Action

As this Court has previously explained, the question of "[w]hether petitioner should have been granted leave to intervene is quite distinct, both analytically and factually, from the question of whether the Court of Appeals should vacate judgments where the parties have so stipulated." *Izumi*, 114 S.Ct. at 427. A question concerning intervention is "akin to a question regarding a party's standing,

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[3] ABC repeatedly invokes the argument that injustice results when wealthy parties can "buy off" judgments. Totally apart from the fact that nothing ever happened to any truly final judgment in this case, it is highly ironic that ABC should be trying to cloak itself in the garb of the poor or the weak.

Not only is the "buy off" argument not factually supported, the claimed preclusive effect in this case has value *only* to ABC, a corporate colossus whose power and wealth vastly exceed that of all the plaintiffs and defendants in the *Purcell* action combined. Only the private economic interest of ABC's even more powerful and wealthy shareholders is at stake here.

ABC simply wants to avoid the expense and—given its truly egregious misbehavior in the broadcast attack on BFC and Mr. Levan—the likelihood of a loss when it faces a jury. In its zeal to promote its own economic interest, ABC has been quite willing to utterly destroy the settlement that the district court judge expressly approved. ABC's claim to be promoting the public interest is hollow indeed.

which [this Court has] described as a 'threshold inquiry' that 'in no way depends on the merits' of the case." *Id.* In a case such as the present one, where a *district* court rather than a Court of Appeals vacated an interlocutory order, any questions relating to intervention are even more "distinct" from the "merits" of vacatur than as discussed in *Izumi*.

Moreover, as this Court has further explained, decisions on any particular motion to intervene are "always to some extent bound up in the facts of the particular case." *Id.* at 428. That being the case, this Court has concluded it would have to be a very unusual situation to warrant the grant of certiorari to review solely the "relatively factbound issue" of intervention in a Court of Appeals decision. *Id.*

There is absolutely nothing unusual in the Eleventh Circuit's review of ABC's motion for intervention in this case. In fact, the Eleventh Circuit's decision is *solely* a garden variety intervention decision. As explained above, enforcement of the vacatur decision by this Court in *U.S. Bancorp* is not implicated in the present situation. Nor were there any issues of broad public interest or importance involved in *Purcell*, the underlying case in which ABC sought to intervene. Indeed, the only issue implicated by ABC's motion to intervene was ABC's economic self-interest. The fact that ABC will have to face a jury in the *Levan* case is hardly an issue of sufficient importance to warrant review by this Court.

Although ABC argues that a conflict between the circuits exists as to the standards for intervention as of right,[4] ABC does not argue that the alleged conflict is itself a sufficiently significant issue to warrant this Court granting the requested writ. It is only in the context of the inappropriately claimed need to "enforce" *U.S. Ban-*

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[4] ABC raises no issue in this Court about the denial of its motion for permissive intervention.

corp that ABC contends the "conflict" attains such significance. Considering that *U.S. Bankcorp* is fundamentally irrelevant to the present case, the significance, if any, of the alleged conflict for this case diminishes to the vanishing point.

Additionally, the "conflict" may actually be, more than anything, a result of the "relatively factbound" nature of motions for intervention, to use this Court's term, than a true conflict in legal principles. That is, the "conflict" may be more linguistic than real, with the real problem being the difficulty of setting forth black letter rules for a subject matter that depends heavily on the facts of each case. *See, Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) ("Since this task [deciding whether intervention of right is warranted] will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides.").

After all, as ABC points out, this Court has itself already twice addressed the issue of the interest necessary for intervention as of right. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Donaldson v. United States*, 400 U.S. 517 (1971). And the most recent of those decisions (*Donaldson*) was even cited by the Eleventh Circuit as one of the authorities for its adoption of the standard that intervention of right "must be supported by 'direct, substantial, legally protectible interest in the proceeding.' " *Athens Lumber Co., Inc. v. Federal Elections Commission*, 690 F.2d 1364, 1366 (11th Cir. 1982).

Moreover, even if one were to accept that a conflict exists, the notion of "interest" in the "less restrictive" cases cited by ABC is far different than the type of interest advanced by ABC in this case. The "interest" involved in those cases focuses on the extent or degree to which there must be a real involvement of some kind by a prospective intervenor in the subject matter of the underlying lawsuit to intervene as of right. *See County of*

Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967).

ABC has absolutely no such interest. ABC has not claimed to be an investor in any kind of real estate limited partnership for which an exchange offer has been made. Nor has ABC claimed to be engaged in the business of real estate limited partnerships, let alone ever actually been involved in an exchange transaction of any kind. ABC's claimed interest—in a jury verdict against BFC and Levan—is collateral and far more remote. That is not the kind of "interest" contemplated by Rule 24. *See Donaldson*, 400 U.S. at 531.[5]

Even if this "conflict," despite its relative insignificance compared to other issues faced by the Court, were to be a subject of review, this is not an appropriate case in which to undertake the review. As ABC itself admits, it has no direct interest in the subject matter of the underlying *Purcell* case. ABC is a total stranger to that litigation, never having had any stake, however remote, in the exchange transaction. If review of this particular case were undertaken, therefore, the Court would have no factual basis with which to even attempt further refinement of the meaning of an "interest" sufficient to grant intervention as of right. Even if the Court were prepared to take the extreme position that the mere possibility of collateral estoppel effect without more is sufficient to allow intervention of right, the Court, to accept this case, would

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[5] This Court's opinion in *Donaldson* strongly suggests that the Court would hold against ABC if it were to hear the case on the merits. The Court rejected, as not "the kind [of interest] contemplated by Rule 24(a)," a movant's argument that he should be allowed to intervene because a lower tribunal's decision whether to require production of certain documents from a third party would have a collateral effect on his own subsequent trial. 400 U.S. at 531. The Court further noted, in a manner similar to the observation of the Eleventh Circuit in this case, that the movant's interests may be asserted "at its proper place in any subsequent trial." *Id.*

also have to be prepared to take a still more extreme step and hold that upon the return of a jury verdict, even before entry of a final judgment, anyone who might be able to claim some form of preclusive effect is entitled to intervene as a matter of right.

This is also not an appropriate case to consider the "conflict" because there were no questions of great general importance or broad public interest in the issues that were actually litigated in the underlying class action. It was a "disclosure" case under well-established securities law. Although highly important to the parties, it was of no interest to the public. Not even the general issue of "roll-ups," a subject of the libelous ABC broadcast, was featured in the trial. The only question considered by the jury was whether BFC and Levan actually thought the exchange transaction was fair. As evidence of the lack of public importance, it should be noted that ABC did not even try to file an *amicus* brief. There is, therefore, no basis at all in this case for the Court to hold, even if it were so inclined, that the mere existence of important policy issues in a case could support intervention as of right.

It comes down to this: ABC wants the Court to instruct all district courts that they *must* allow intervention *as of right* whenever any party claims that a jury verdict (or, at least, a jury verdict followed by some form of interlocutory order) might afford that party some preclusive effect. For ABC it is not enough that district courts can, in the exercise of their sound discretion, permit intervention on a permissive basis to promote judicial economy or other objectives. ABC seeks an absolute right of intervention in the most extreme of circumstances to promote its own self-interest. That is, ABC wants this Court to expend its valuable resources to create an outlandish rule of sweeping and unprecedented impact so that ABC will not have to face a jury in one particular case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
BRADFORD SWING
ALAN H. FEIN
STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
Miami, Florida

Dated: August 22, 1996

EUGENE E. STEARNS
STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
Suite 2200, Museum Tower
150 West Flagler Street
Miami, FL 33130
(305) 789-3200
Counsel of Record for
BankAtlantic Financial
Corporation and
Alan B. Levan

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-325-CIV-ATKINS

ALAN B. LEVAN, an individual,

and

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,

Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC.,
a New York Corporation, and
WILLIAM H. WILLSON, an individual,

Defendants.

REPORT AND RECOMMENDATION

This Cause was referred to the undersigned United States Magistrate Judge by the Honorable C. Clyde Atkins, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Pending before this Court are Defendants' *Motion for Entry of Order that Plaintiffs are Public Figures* (D.E. 66) and Defendants' *Motion for Summary Judgment* (D.E. 68).

FACTUAL BACKGROUND

A. "20/20" Investigation

In or around 1991, "20/20," a television news magazine produced and broadcast under the auspices of ABC News, began to pursue a story centering around invest-

ment transactions known as "roll-ups" and specifically one such roll-up managed by Plaintiffs. *Complaint,* (D.E. 1) at 8-9. Plaintiffs allege that William Willson, the producer responsible for this story idea, discussed possible investigations of Plaintiffs with the staff of the U.S. House of Representatives Subcommittee on Energy and Commerce and with several Florida newspapers, in order to generate controversy around Plaintiffs' actions and then cover the resulting investigations. *Id.* at 9-12. While 20/20 continued preparing its story, Plaintiffs cooperated with Willson and participated in several off-the-record discussions while negotiations regarding an on-camera interview proceeded. *Id.* at 14. When Willson decided that the on-camera interview would include questions regarding Levan's prior divorce proceeding, Levan backed out of the interview, although he continued to express a willingness to proceed so long as such personal questions were not included. *Id.* at 15-16. On June 14, 1991, Plaintiffs sent a letter to Willson stating Plaintiffs' belief that the upcoming story would inaccurately portray Plaintiffs' actions. *Id.* at Exhibit B.

B. The Story

On November 29, 1991, Defendants broadcast the story, entitled "Too Good to Be True." *Complaint* at 18.[1] The story discussed the investment technique of real estate limited partnerships, whereby groups of small investors could pool their money to be managed by a general partner in the real estate market. The story discussed the phenomenon of "roll-ups" in which the real estate holdings of such partnerships are exchanged for some other investment, usually bonds. *Answer* (D.E. 12), Ex. A at 7. Plaintiffs' alleged roll-up was the focus of the story.

The introduction of the story contained a voice-over describing the general idea of real-estate investment roll-

[1] A complete transcript of the show is filed with Defendants' *Answer* (D.E. 12) at Exhibit A.

ups, while images of protestors picketing against roll-ups were shown. Then Rosalyn Lamb, an investor with Plaintiffs, was depicted complaining about losing her money. Finally, the voice-over stated that the man behind it all "refused to talk to [ABC]."

The story described how the real estate partnerships managed by Plaintiffs, though initially successful, were hurt by the collapsing real estate market of the mid to late 1980's, leaving the value of the real estate holdings at a fraction of their original worth. Plaintiffs were then said to have offered the limited partners debentures issued by BankAtlantic in exchange for the real estate holdings. Plaintiffs recommended this transaction, according to the story, as a means for the limited partners to cut their losses.

The story reported that since the exchange, Plaintiffs sold a property formally valued at $5 million, for $4 million. Plaintiffs allegedly kept the money, leaving the limited partners with the debentures. The story then reported that the debentures have, since the exchange, lost most of their value. It was reported that although Plaintiffs had made every interest payment to date, the financial condition of BankAtlantic made it unlikely that all payments would be made. The on-air reporter, John Stossel, made the statement, "You've heard of junk bonds? This is perceived as real junk." A Mr. Roy Henry, described in the story as a "Financial Planner," stated that this transaction was "the worst roll-up he had seen."

Several limited partners were shown complaining that their investments have disappeared. One investor stated that the debenture he has is for the amount of $350, whereas his original investment was $2500. Dozens of protestors were portrayed picketing a meeting of general partners, though the voice-over did indicate that these people were involved in another roll-up with no connection to Plaintiffs.

Stossel reported that a majority of limited partners voted in favor of the transaction, on Plaintiffs' recommendation. Representative Matthew Rinaldo was shown criticizing the 360 page prospectus regarding the transaction which was mailed to the limited partners by Plaintiffs. Rosalyn Lamb, an investor, stated that a company was hired by Plaintiffs to encourage the investors to approve the transaction. She stated, "We got phone calls. 'Vote yes. This is the only way to go. If you don't vote yes, you'll lose all your money.' "

Stossel reported that at that time, Levan received a salary of one million dollars a year for managing the partnership. Then, Stossel repeated the assertion that Levan "would not face the cameras." The story indicated that Levan prepared a taped interview depicting him responding to expected questions regarding the transaction. On the program, the tape was used to show Levan responding to a dubbed-in question by John Stossel regarding the conflict of interest involved in being the general partner of the real estate fund and also the President of BankAtlantic.

The story then depicted Levan's appearance before the House Subcommittee on Energy and Commerce. Stossel remarked that this appearance would perhaps yield answers regarding Plaintiffs' actions. Levan was then shown requesting that cameras be turned off in accordance with House rules. After the camera faded out, a scene was depicted in which it appeared that Levan was listening to Representative Thomas Bliley responding to Levan's testimony before the committee. Rep. Bliley stated, "There appears to be only one winner here—Alan Levan. It is clear that the limited partners, the real estate investors, have not benefited nor are they likely to." The story then concluded with general remarks regarding the unfairness of the transaction and the losses of the limited partners.

C. Plaintiffs' Objections

On December 20, 1991, attorney Eugene E. Stearns, on behalf of Plaintiffs, sent a letter to Walter R. Porges, Vice President of News Practices for ABC News, detailing the allegedly false and defamatory statements contained in the story and demanding a retraction. *Complaint* (D.E. 1), at Exhibit D. Stearns indicated that the letter was drafted in accordance with Chapter 770, Florida Statutes. The letter objects to the general characterization of Plaintiffs in the story and chronicles each statement and image and the allegedly false or misleading aspect of each. The letter is attached to the complaint and the objections are therein restated.

PROCEDURAL BACKGROUND

Plaintiffs' Complaint was filed February 7, 1992, challenging the general characterization of Plaintiffs and enumerating the many allegedly false and misleading statements and images. Amongst the specific objections contained in the complaint and attached letter are:

—that the picketers shown in the story were protesting another roll-up having nothing to do with Plaintiffs (*Complaint* (D.E. 1) at 20);

—that all payments owed on the debentures had been made at the time of the story, and that there was no reason to believe that they would stop (*Id.* at 21);

—that Levan was ready and willing to talk with 20/20, and that the on-camera interview was only canceled as a result of Willson's decision to include questions regarding Levan's divorce (*Id.* at 21-22);

—that showing pictures of Levan's expensive home gave the false impression that he got rich by cheating the investors (*Id.* at 24);

—that the property said to have been sold for $4 million had a mortgage on it, leaving the company, not Levan personally, with only five hundred thousand dollars (*Id.* at 33);

—that Roy Henry was biased against Plaintiffs and has stated publicly that he would put Levan out of business (*Id.* at 34);

—that Roy Henry had seen transactions in which investors lost more money, thus this could not be the worst roll-up he had seen (*Id.* at 35);

—that Levan had not spent money to influence the investors' votes (*Id.* at 36).

—that Levan did not avoid giving answers by requesting that cameras not be used at the House hearing, a request fully in keeping with House rules (*Id.* at 39);

—that Rep. Bliley's statements were not made to Levan in response to his testimony, but rather were introductory remarks made before Levan entered the hearing room (*Id.* at 40);

—that 20/20 mischaracterized the statements spoken by Levan on his prepared videotaped "interview" by dubbing in questions different from the ones to which Levan was responding (*Id.* at Ex. D p.14, 32);

In response to the December 20 letter, 20/20 aired an apology, stating that Levan did not keep the $4 million, but that the company received only $500,000, and that Levan was willing to talk with 20/20, but that negotiations had broken down.

The complaint charges that Defendants willfully and with malice aired false and defamatory statements. The complaint also charges Defendants with an invasion of Levan's privacy by placing him in a false light.

Defendants have filed a *Motion for Entry of Order Determining that Plaintiffs are Public Figures* (D.E. 66). In their memorandum of law in support of the motion (D.E. 67), Defendants noted that should Plaintiffs be determined to be public figures, the standard of proof will be raised from having merely to prove negligence by a preponderance of the evidence to having to prove actual malice by clear and convincing evidence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Defendants maintain that Plaintiffs are limited public figures as defined in *Waldbaum v. Fairchild Publishers, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); and *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) (D.E. 67 at 5). In sum, Defendants argue that the broadcast concerned matters of public controversy, that Plaintiffs were significant and prominent actors in the public controversy, that the allegedly defamatory statements concerned the public controversy, and that Plaintiffs have sought and received wide press coverage of their activities.

Plaintiffs respond to this motion arguing that the determination of whether a party is considered a public figure must wait for the close of evidence unless no genuine issue of material fact exists on the issue. Second, Plaintiffs maintain that they lack sufficient access to the media to counteract the alleged defamation by the 20/20 broadcast. *See Gertz*, 418 U.S. at 344. Third, Plaintiffs assert that they have not been sufficiently involved in the alleged public controversy to be considered public figures. This argument is based on the premise that Defendants have failed to show that there was a public controversy and that Plaintiffs did not participate in any such controversy.

Defendants reply that Plaintiffs have failed to offer any evidence that would indicate a genuine issue of material

fact. Finally, Defendants argue that the test in *Silvester v. American Broadcast Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988) controls this issue.

Defendants have also filed a *Motion for Summary Judgment* (D.E. 68). In their accompanying memorandum of law, Defendants argue that under both Florida law and federal Constitutional law Plaintiffs must be able to prove that the gist of the story was false. Defendants maintain that Plaintiffs cannot meet this burden because of the verdict in the consolidated *Purcell* litigation (89-1284-CV-RYSKAMP, 89-1605-CV-RYSKAMP, and 89-1850-CV-RYSKAMP) [*Purcell*], in which a jury found that the transaction discussed in the 20/20 story was unfair and that Plaintiffs knew this when they recommended it.[2] In light of this verdict, Defendants maintain that Plaintiffs are precluded from arguing that the gist of the story was untrue. Second, Defendants argue that under Florida law a libel action cannot be maintained if the overall effect of a broadcast would be relatively the same after eliminating the allegedly false statements.

Plaintiffs respond that the gist of the story was not simply that the transaction was unfair, but that Levan made his fortune by cheating small investors and then avoided talking to ABC. Further, Plaintiffs assert that it is the jury, as trier of fact, which must determine what the gist of the story was. Additionally, Plaintiff's maintain that the *Purcell* decision does not apply to this case, since that verdict did not find that the many specific allegedly false statements were true (e.g., that Levan wouldn't talk to 20/20).

ANALYSIS

A. The Public Figure Motion

As a primary matter, in this case the facts are sufficiently clear to allow the court to make a determination

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[2] The *Purcell* case is more fully discussed below.

as to Plaintiffs' status as public figures. In addressing this issue, the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Fifth Circuit in *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), and the Eleventh Circuit in *Silvester v. American Broadcasting Co.*, 839 F.2d 1491 (11th Cir. 1981), have all concluded that the court, rather than the jury, may determine whether an individual is a public figure. In *Silvester*, the district court stated that a public figure determination should be made as a matter of law "if no genuine issue of material fact exists, viewing the evidence in the light most favorable to the [opposing party. . . .]" *Silvester*, 650 F.Supp. 766, 772 (S.D. Fla. 1986).

Under the Supreme Court's analysis in *Gertz*, 418 U.S. 323 (1974), there are two methods for determining whether one is a public figure. *See also, Rebozo*, 637 F.2d 375, 378 (5th Cir. 1981). First, the court must decide whether the party "enjoy[s] significantly greater access to the channels of effective communication and hence [has] a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. Alternatively, the court may look to see whether the party has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. This latter method applies to "limited public figures." *See Silvester*, 839 F.2d at 1494. A limited public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. It is as limited public figures that Defendants ask the Court to classify Plaintiffs.

To make such a determination, the court must "(1) isolate the public controversy, (2) examine the Plaintiffs' involvement in the controversy, and (3) determine whether 'the alleged defamation [was] germane to the Plaintiffs' participation in the controversy.'" *Silvester*,

839 F.2d at 1494, citing *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 266.

In determining whether a public controversy existed, a court should ask:

> whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.

Id. at 1297. On this point, Defendants have offered voluminous uncontested evidence. As to the subject of roll-ups in general, Defendants produced extensive evidence of discussion in Congress and the national media (D.E. 66, Exhibit A [Buckley Affidavit], Exhibits 2, 3, 4, 5, 6, 7). Examples of media discussion include an article in the *San Francisco Examiner* dated July 5, 1987, an article in *Barron's* dated September 4, 1989, and an article in the *Wall Street Journal* dated February 28, 1990. The Congressional hearings cited include hearings held on October 3, 1990, February 27, 1991, and March 21, 1991. Therefore, the subject of roll-ups was a public controversy before the airing of the disputed story.

As to Plaintiffs' involvement in the controversy, Defendants' have again offered great quantities of evidence. The evidence indicates that Plaintiffs' roll-ups were mentioned in the ongoing Congressional hearings (Buckley Affidavit, Ex. 5 at 56, Ex. 7 at 42) and were specifically addressed in Congressional hearings held on July 10, 1991 (Buckley Affidavit, Ex. 6). The evidence further shows that other administrative agencies, such as the SEC and Office of Thrift Supervision were also interested in Plaintiffs' roll-ups prior to the story (*Id.* at 66-98, 102-109).

Plaintiffs' activities were widely reported in local and national publications, such as, *inter alia*, the *Miami Herald* on March 31, 1989, the *Raleigh News and Observer* on January 3, 1990, *Stanger's Investment Advisor* in June, 1990, *Investment Watch News* in September, 1990, and the *San Francisco Chronicle* on October 3, 1990. Articles were specifically focussed on Plaintiffs' financial strength and wisdom (Buckley Affidavit, Exs. 10, 11). What is particularly impressive about all of this evidence is not its volume, though it is substantial. Rather, it is the depth and diversity of evidence that is telling. It is clear that roll-ups were a widely discussed public controversy and that Plaintiffs were widely identified as participants in that controversy, which was the focus of the story.

In addition to Plaintiffs involvement in this particular controversy, the evidence indicates that Plaintiffs have, over the years, sought and received significant attention in the media. Plaintiffs have marketed themselves extensively on a national scale. Defendants have offered evidence of a coordinated effort by Plaintiffs to advertise and promote themselves as respectable national investment managers (Buckley Affidavit, Exs. 12-17, 20-21), employing national representatives in order to gain nationwide prominence (Buckley Affidavit, Ex. 18). In prior years, Plaintiffs have sought and received wide media attention concerning the original acquisition of BankAtlantic (Buckley Affidavit Exs. 29-33). National publications such as *American Banker*, the *Wall Street Journal*, *Business Week*, and the *BNA Banking Report*, as well as local papers, have covered Plaintiffs' activities for years (*Id.*). Plaintiffs are no strangers to national exposure. In *Long v. Cooper*, 848 F.2d 1202, 1205 (11th Cir. 1988), the Eleventh Circuit ruled that vigorous publicity to educate the community and to influence policies of the public and other firms could be sufficient activity to be declared a limited public figure. *See also Waldbaum*, 627 F.2d at 1299.

Whether considered under *Long*, *Silvester*, or *Gertz*, Plaintiffs are public figures. A public controversy surrounding roll-ups existed, Plaintiffs thrust themselves (or were drawn) into the controversy, and they have solicited the interest of the media for many years. Therefore, as a matter of law, they have access to significant communication and have "thrust themselves to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved . . . [and] they [have] invite[d] attention and comment." *Gertz*, 418 U.S. at 345. The evidence supporting this conclusion is overwhelming.

B. The Summary Judgment Motion

The issue underlying this motion is whether or not Plaintiffs can prove that the gist of the 20/20 story is false and defamatory, in light of the *Purcell* ruling.

Both Florida law and federal Constitutional law require that plaintiffs in a libel action prove that the overall substance of the entire offending publication is false. Florida courts have ruled that "[t]he significance lies . . . not within the import of any particular word or words used in a publication but within the over all [sic] effect of the language." *O'Neal v. Tribune Co.*, 176 So.2d 535, 548 (Fla. Dist. Ct. App. 1965). Further, "a publication must be considered in its totality. 'The court must consider all the words used, not merely a particular phrase or sentence.'" *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. Dist. Ct. App. 1983) (citing *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 789 (9th Cir. 1980)).

Federal law also limits a libel action to an attack on the gist of the publication. The Supreme Court has ruled that the common law of libel overlooks minor inaccuracies and concentrates on substantial truth. *Masson v. New Yorker Magazine, Inc.*, —— U.S. ——, 111 S.Ct. 2419 (1991). "Minor inaccuracies do not amount to

falsity so long as 'the substance, the gist, the sting of the libelous charge be justified.'" *Id.* at 2433. Further, a statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted).

First Amendment considerations require some leeway for the press to discuss controversial matters without a chilling fear of being required to prove the truth of all injurious statements. *Jones v. American Broadcasting Cos.*, 694 F.Supp. 1542, 1550 (M.D. Fla. 1988). "To be true 'it is not essential that the literal truth be established in every detail as long as the article contains the gist of the truth as ordinarily understood.' *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir. 1978)." *Jones*, 694 F.Supp. at 1550. In short, "the law requires only that the publication be substantially true." *Nelson v. Associated Press, Inc.*, 667 F.Supp. 1468, 1477 (S.D. Fla. 1987).

Plaintiffs argue that it is not for the court to say what the gist of the story was. It is their contention that such a determination must be left for the jury, unless the issue is so unambiguous that the court is able to make that determination as a matter of law. Contrary to this assertion, however, courts have not been so reluctant to make such determinations. *See Bressler v. Fortune Magazine, Div. of Time*, 971 F.2d 1226 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1416 (1993) (the court summarizes seven paragraphs of an article in one sentence); and *O'Neal*, 176 So.2d at 548 (the court summarizes two newspaper articles in a short statement).

Even the cases cited by Plaintiffs indicate that a court is capable of deciding what the gist of a story is. In *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987), the court affirmed a district court's refusal to grant summary judgment because a jury could believe that the "sting" of a felony accusation was worse

than the "sting" of the malfeasance which was the true circumstance. In *Prins v. International Tel. and Tel. Corp.*, 757 F.Supp. 87, 92 (D. D.C. 1991), the court refused to say as a matter of law that the published statement would have no worse effect than the actual truth. Neither of these cases stand for the proposition that a court ought not decide the gist of a story as a matter of law in circumstances in which a jury could not say that the "sting" of the published story was worse than the actual truth.

In this case, the gist of the story is sufficiently clear and unambiguous for the court to make that determination as a matter of law. After carefully reviewing the transcripts and, more importantly a videotape of the broadcast itself, the gist of the story can be stated as a report on roll-ups in general, Plaintiffs' roll-up in particular, and the unfairness of this particular transaction to the limited partners. It is this summary that Plaintiffs must show is false.

Simplifying matters in this case is the verdict in the *Purcell* litigation. That case was a class action brought by a group of limited partners who had voted against the roll-up. Plaintiffs in the *Purcell* case charged the present Plaintiffs with securities fraud under Section 12(2) of the Securities Act of 1933, Section 10(b) of the Securities Act of 1933, and Section 14(a) of the Securities Act of 1934. Defendants' *Motion for Summary Judgment* (D.E. 68, Ex. 2 at 7-8). The verdict form that was given to the jury contained five questions. Question 1 asked:

> Have the plaintiffs proved, by the greater weight of the evidence, that the Exchange Transaction proposed by BankAtlantic Financial Corporation was "unfair" to the limited partners of I.R.E. Series 21, I.R.E. Series 23 and I.R.E. Series 24?

Id. at 18. The jury answered, "Yes." Question 2 asked:

> Have the plaintiffs proved by the greater weight of the evidence, that the managing general partners, or

> the company or Alan Levan falsely stated in the Prospectus and the transmittal letter that they believed that the Exchange transaction was "fair" when they knowingly believed otherwise?

Id. The jury answered, "Yes." *Purcell,* in short, held that the transaction was unfair to the limited partners, that the present Plaintiffs knew it was unfair, but that the present Plaintiffs falsely recommended the transaction to the limited partners as fair.

The doctrine of issue preclusion renders the prior determination in *Purcell* binding in subsequent actions involving the same issues. That the parties to the present action are not identical to the parties in the *Purcell* litigation does not affect the res judicata analysis. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) (recognizing nonmutual issue preclusion).[3] In the Eleventh Circuit, the following criteria apply when evaluating issue preclusion:

> (1) the issue at stake [in the second litigation] must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action. . . . In addition, the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985) (citations omitted). The question in the instant case, that is, whether the transaction was fair, is clearly identical to the question decided

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[3] In a federal diversity action, examining the preclusive effect of a prior federal action, the federal common law of issue preclusion applies. *Precision Air Parts, Inc. v. Avco Corp.,* 736 F.2d 1499 (11th Cir. 1984), *cert. denied,* 469 U.S. 1191 (1985).

by *Purcell*. Further, that question was fully litigated in the prior action and was the focus of the verdict as reflected in the special interrogatories. Finally, the present Plaintiffs had every incentive and opportunity to address that question in the prior action. Therefore, under the doctrine of issue preclusion, the undersigned must accept as true the statement that the transactions spoken of in the 20/20 story were unfair to the limited partners, that Plaintiffs knew that they were unfair, and that despite this knowledge, Plaintiffs counseled the limited partners otherwise.

Given the preclusive effect of *Purcell*, Plaintiffs will be unable to prove that the gist of the 20/20 story is false. The story stated that the transaction was unfair to the limited partners, but that Plaintiffs, who knew better, endorsed it anyway. *Purcell* found that this was exactly what happened. Therefore, for the purposes of this litigation, the story is substantially true. Accordingly, because Plaintiffs will be unable to prove that the story is false, summary judgment must be granted in favor of Defendants.

Though it has been determined that the story is substantially true according to principles of libel law and First Amendment considerations, the undersigned wishes the parties to be aware of the care with which the story was examined. It is clear that 20/20 took license with presenting the facts. Many of the individual statements in the story were misleading, if not completely false. It is worth repeating some of the more egregious examples. Levan was ready and willing to talk with 20/20, and only refrained from consenting to an on-camera interview when 20/20 producer Willson added personal questions regarding Levan's divorce to the list of possible questions. Reporting otherwise was clearly intended to taint Levan's credibility with the viewing public, who would not be privy to the off-camera negotiations that led up to Levan's decision not to appear.

Dubbing in a different question and taking statements out of context from the videotaped interview supplied by Levan were irresponsible and misleading actions. These tactics allowed 20/20 to use Levan's own words to produce false or misleading impressions.

The use of images of people picketing a meeting of general partners was completely misleading, as those general partners had nothing to do with Plaintiffs' transactions. Though 20/20 did include a brief disclaimer regarding these protesters, the juxtaposition of the images with the ongoing story almost certainly worked to associate Plaintiffs with the unhappy people pictured.

Finally, and perhaps most reprehensibly, Defendants' editing allowed them to portray the remarks of Rep. Bliley as being uttered directly to Levan in response to his testimony, when in fact Rep. Bliley's statements were made before Levan appeared and testified. This crafty piece of editing was unfair not only to Levan, but to Rep. Bliley as well.

These examples indicate that the practices of 20/20 in producing this story were shamefully irresponsible. The undersigned is left with the impression that ABC cared more about telling a good story than an accurate one. While the piece as a whole may have been true in the strict legal sense, ethical journalism it was not.

In this country the media are given wide latitude to report the news as they see fit. Democracy depends on a free and independent press. Nevertheless, it is the responsibility of the media to take care in reporting the news. They must not decide that any and all means are justified to get at the truth, for if the press disregards the truth of the details, how can the public trust the truth of the substance? In any event, one can only hope that the practices disclosed in this litigation are not typical of Defendants' present news reporting practices.

RECOMMENDATION

Based on the foregoing, it is hereby RECOMMENDED that Defendants' *Motion for Entry of Order that Plaintiffs are Public Figures* (D.E. 66) be GRANTED and that Defendants' *Motion for Summary Judgment* (D.E. 68) be GRANTED.

Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable C. Clyde Atkins, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

RESPECTFULLY RECOMMENDED, in Chambers, at Miami, Florida, this 22 day of July, 1993.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
United States Magistrate Judge

cc: Honorable C. Clyde Atkins
Raymond V. Miller, Esq.
Alan H. Fein, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORP.,
a Florida Corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC.,
a New York Corporation and
WILLIAM H. WILLSON, an individual,
Defendants.

REPORT AND RECOMMENDATION

This Cause was refered to the undersigned United States Magistrate Judge by the Honorable C. Clyde Atkins, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Presently pending before the undersigned is Defendants' *Motion for Summary Judgment* (D.E. 68).

FACTUAL AND PROCEDURAL HISTORY

This defamation action was brought nearly three years ago by Plaintiffs BankAtlantic Financial Corporation ("BFC") and its President and Chief Executive Officer, Alan B. Levan. Plaintiffs' complaint alleges that a news report aired on the ABC News television program "20/20" was libelous and false. This broadcast reported on the controversy surrounding financial transactions known

as "roll-ups" and specifically featured certain roll-ups promoted and executed by Plaintiffs.

In February 1993, Defendants Capital Cities/ABC and William H. Willson moved for summary judgment. Defendants contended that dismissal was appropriate because Plaintiffs had failed to show that the overall gist of the broadcast was false, a threshold requirement in a defamation action.

On July 22, 1993, the undersigned issued a Report and Recommendation concerning the motion for summary judgment. (D.E. 203). The Report analyzed in detail the ABC broadcast at issue. That Report concluded that the "gist" of the broadcast was that the roll-up transactions promoted by Plaintiffs "were unfair to the limited partners, that Plaintiffs knew that they were unfair, and despite this knowledge, Plaintiffs counseled the limited partners otherwise." *Report and Recommendation* (D.E. 203) at 18. The undersigned found that the issue of whether the roll-ups were knowingly unfair had been previously determined in a prior action styled *Purcell v. Bank Atlantic Financial Corporation*, No. 89-1284-CIV-Ryskamp).[1] Based on this prior judgment, the undersigned recommended dismissing this action since the prior judgment conclusively established that the "gist" of the broadcast (that the roll-ups were knowingly unfair to the limited partners) was substantially true. Accordingly, the undersigned concluded that Plaintiffs were precluded from collaterally relitigating whether the roll-ups were unfair in this subsequent defamation action and thus recommended summary judgment.

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[1] In *Purcell*, Plaintiffs Alan Levan and BFC were found liable for securities fraud. The *Purcell* jury found that certain "roll-up" transactions which Levan and BFC had proposed to their limited partners were unfair and that Plaintiffs knew this when they recommended them. The *Purcell* case is discussed in detail in the July 22, 1993, Report and Recommendation (D.E. 203) at 16-18).

Subsequent to the issuance of that Report, several events have occurred that require the undersigned to reconsider its recommendation. First, in July 1993, Plaintiffs appealed the *Purcell* judgment to the Eleventh Circuit Court of Appeals. In February 1994, the Eleventh Circuit dismissed the *Purcell* appeal due to the lack of finality of judgment. Recognizing that this dismissal might have serious implications in this action, on March 21, 1994, District Judge C. Clyde Atkins issued an Omnibus Order in which he deferred ruling on the Report and Recommendation pending the outcome in *Purcell*. *Omnibus Order* (D.E. 264) at 2.

On April 1, 1994, Plaintiffs filed a status report advising the Court that the parties in *Purcell* had agreed to settle the case and had agreed in principal that the settlement would include a vacatur of the *Purcell* judgment. Consequently, on June 6, 1994, Judge Atkins entered an Order addressing the uncertainty surrounding the finality of the *Purcell* judgment. (D.E. 267). Noting that the judgment in *Purcell* "may no longer be final," Judge Atkins rejected that portion of the Report recommending summary judgment and referred the matter back to the undersigned for further consideration in light of the circumstances in *Purcell*. *Order on Report and Recommendation* (D.E. 267).

On September 12, 1994, the *Purcell* court entered a new Final Judgment which vacated its prior judgment and verdict. The new final judgment made the following findings:

> 1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs.
>
> . . . .
>
> 3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought

> the proposal was fair, regardless of the merit of the claim. . . . In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.
>
> 5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

Based on these findings, the court ruled as follows:

> 4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

Final Judgment Approving Settlement and Order of Dismissal, (D.E. 282) Exhibit C. This vacatur calls into question the preclusive effect of the original *Purcell* judgment. Thus, the undersigned must reexamine whether there still exist grounds for granting summary judgment. Oral argument on this issue was heard on February 8, 1995.

ANALYSIS

To begin, the undersigned notes that despite the language in the *Purcell* final judgment order stating otherwise, the determination of whether the *Purcell* verdict and judgment preclude this action rests with this Court alone. Case law dictates that courts do not have the power to decide the preclusive effect of their judgments in future litigation. The preclusive impact of a prior judgment is solely the province of the court in which the preclusion is being urged. *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 223 (1985); *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991). Thus, the first task for the undersigned is to determine whether the vacated *Purcell* judgment has any preclusive effect in the instant case.

As indicated *supra*, the undersigned had previously found that the *Purcell* judgment did preclude further action in the instant case. Shortly after making this recommendation, the *Purcell* judgment on which the finding was based was vacated. Thus, the vacatur of the *Purcell* judgment no longer provides the undersigned with a certain judgment in which to ground collateral estoppel. Nonetheless, Defendants contend that the *Purcell* verdict and judgment are sufficiently final to support the application of collateral estoppel. A careful review of Defendants' position shows that their argument is unavailing.

Defendants admit that as a general matter if a judgment is vacated, the judgment will not be given preclusive effect. *See United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992) (holding that vacatur divests the lower court's earlier judgment of its binding effect); *No East-West Hwy. Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel."); *Wolcott v. Ginsburg*, 697 F. Supp. 540, 543 (D.D.C. 1988) ("As a general matter a judgment which is vacated, for whatever reason, is de-

prived of its collateral effect, both as collateral estoppel and res judicata."). However, Defendants contend that the same result is not warranted in a situation where as here, a judgment has been vacated at the request of two private parties because they have settled after the entry of judgment.

Defendants cite several cases recognizing that judgments that are not final for all purposes may be sufficient for purposes of collateral estoppel so long as the issue in question was fully and fairly litigated and the decision that resulted was not tentative. *See e.g. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990) *cert. denied*, 500 U.S. 905 (1991) (defendants were collaterally estopped from relitigating issues determined by jury's verdict on liability even though the damages phase of the prior litigation was not concluded); *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985) *cert. denied*, 475 U.S. 1095 (1986); *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-92 (5th Cir. 1982) *vacated and remanded on other grounds*, 460 U.S. 1013 (1983), *initial opinion adhered to on remand*, 718 F.2d 725 (5th Cir.), *cert. denied*, 460 U.S. 1013 (1983); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961) (holding that "finality" in the context of collateral estoppel may mean little more than that the litigation of a particular issue has reached a stage that a court sees no good reason for permitting it to be relitigated). However, none of the cases Defendants cite address the situation here, where the court has vacated its prior judgment. Defendants fail to cite one case from this Circuit in which a vacated judgment has been given a preclusive effect.

Given the lack of case law on point, Defendants ask for equitable relief. Defendants contend that Plaintiffs' settlement of *Purcell* was little more than an attempt to buy off the estoppel effect of the *Purcell* judgment and verdict.

Defendants argue that such manipulation of the judicial system warrants this court using its equitable powers to overlook the vacatur of the *Purcell* judgment. Indeed, several courts have expressed their concern with the possible injury done to the court's integrity in situations where deep-pocketed litigants offer lucrative settlement terms in return for a joint motion to vacate. *See e.g., Federal Deposit Insurance Corp. v. Mintz,* No. 92-6679-CIV-GONZALEZ (S.D. Fla. July 26, 1984); *In re United States,* 927 F.2d 626, 627 (D.C. Cir. 1991); *Clarendon Ltd. v. Nu-West Industries, Inc.,* 936 F.2d 127 (3d Cir. 1991); *In re Memorial Hospital of Iowa County, Inc.,* 862 F.2d 1299 (7th Cir. 1988); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters,* 686 F.2d 720, 722 (9th Cir. 1982). Defendants specifically point to the United States Supreme Court's recent decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* —— U.S. ——, 115 S.Ct. 386 (1994) as support for their contention.

In *U.S. Bancorp,* the Supreme Court addressed the question of whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after an appeal is filed. The Court expressed its disfavor for such practices and held that judgments should be vacated only in exceptional circumstances and that "mootness by reason of settlement does not justify vacatur of a judgment under review". *Id.* at 393. Writing for a unanimous court, Justice Scalia explained that vacatur is an equitable remedy and as such must take into account the public interest. Scalia elaborated that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 392 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.,* —— U.S. ——, 114 S.Ct. 425 (1993) (STEVENS, J., dissenting).

While the Supreme Court's decision in *U.S. Bancorp* concerned only whether appellate courts should vacate judgments, lower courts have applied the principles set forth in *U.S. Bancorp* to both deny and grant vacatur at the district level. *See Espirito Santo Bank of Florida v. Kyriakides*, Nos. 89-16506-BKC-AJC, 90-0415, 1995 WL 75911 (Bankr. S.D. Fla. Feb. 6, 1995) (finding that "while the matter before this Court did not involve a judgment under review by an appellate court which has become moot, the principles and policies discussed in *U.S. Bancorp* regarding the treatment of motions to vacate judgments were applicable there); *Alexander v. Perrill*, 872 F. Supp. 722 (D. Ariz. 1995) (applying the standards set forth in *U.S. Bancorp* to find that vacatur was appropriate and consistent with Supreme Court precedent). Defendants argue that this precedent combined with the "realities of the *Purcell* litigation" lead to the conclusion that the prior decision in *Purcell* should prevent this Court from relitigating the question of whether the roll-ups were knowingly unfair. However, no courts have stretched the reasoning in *U.S. Bancorp* to the lengths to which Defendants now contend is appropriate. Defendants' contention that the undersigned may somehow look past the vacatur in *Purcell* is not supported by legal precedent nor does it take into account the practical result of such blind neglect.

The practical effect of Defendants' contention would have this Court make a preliminary finding that the *Purcell* court's decision to grant vacatur was unjustified, effectively overruling that court's decision. Neither the decision in *U.S. Bancorp*, nor other cited precedent, grants this Court such license. The factors enumerated by the Supreme Court in *U.S. Bancorp* were for the benefit of appellate (and by implication trial) courts to consider when determining whether *granting* vacatur in certain circumstances is proper. *U.S. Bancorp* does not begin to address what effect a judgment may have once vacated. Indeed, nothing in *U.S. Bancorp* or the other

cases upon which Defendants rely gives a second district court the authority to determine that another trial court's decision to vacate was improvidently granted, thus allowing the second court to accept whichever judgment it believes to be the most equitable. Nor does the undersigned find that the facts of this case warrant such a leap in reasoning.

In the instant case, the presiding judge in *Purcell* considered the actions that occurred at trial and the surrounding circumstances and decided that vacatur of that action was proper. Although the trial judge in *Purcell* did not have the benefit of the reasoning of *Bancorp* to aid in his determination, it is not within the province of this Court to second-guess his decision to vacate. Thus, the undersigned must give the *Purcell* vacatur its full impact.

Although two other circuits have held that in limited circumstances a vacated judgment still may have a preclusive effect, *see Bates v. Union Oil Co.*, 944 F.2d 647, 649-50 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1761 (1992); *Chemetron Corp.*, 682 F.2d at 1190-92; *see also Aetna Casualty and Surety Co. v. Jepperson*, 440 F.2d 394, 199-400, 403-05 (D. Nev. 1977), the Eleventh Circuit has held that a vacated judgment, even if due to settlement, has no precedential effect. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983). The undersigned does not find the facts in this case distinguishable from *Delta*.

Based on the foregoing, the undersigned finds that the vacated judgment in *Purcell* has no preclusive effect. Nothing determined in the *Purcell* action can prevent further litigation by the parties in this action. Although the Court must be ever vigilant in protecting itself from manipulation by deep-pocketed litigants who use their means to strategically avoid the effects of unfavorable rulings, the decision on whether to vacate a judgment ultimately rests with the presiding trial judge. Review of a

trial court's decision to vacate falls solely within the jurisdictional province of the appellate court. Not even the broadest principles of equity allow a second trial court to assume appellate jurisdiction and "look past" a vacated judgment in order to choose a verdict that it believes to be more just.

Moreover, the record in *Purcell* indicates that the vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the court expressed its belief that the judgment had weak underpinnings, was likely to be overturned on appeal, and noted the possibility of jury bias. These findings were consistent with the court's commentary made throughout the trial.[2] Thus, the undersigned believes that vacatur was proper even under the reasoning set forth in *U.S. Bancorp.*

Based on the foregoing, the vacated judgment in Purcell is insufficient to preclude the litigation of any of the issues in the instant case. To hold otherwise would prevent a trial on the merits of this action based on a judgment in a separate action which neither the parties to the prior

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[2] Defendants put great emphasis on the fact that the final judgment was drafted by Levan and BFC's counsel. Defendants state that "the judgment was signed in haec verba at the *Purcell* settlement hearing by the presiding judge who denied without comment or opinion ABC's motion to intervene to protest the vacatur, who didn't ask to hear ABC's objections to the consent judgment until after it was signed, who did not in any oral or written statement indicate that the interest of the public as a whole (let alone ABC) in the preservation of the original judgment had been taken into account." (D.E. 297). At best, Defendants imply that the presiding judge did not take into account several factors that case law suggests he should have before entering the vacatur. At its worst, Defendants argument implies that the presiding judge simply "rubber stamped" the consent judgment without proper consideration. While the undersigned acknowledges that the degree of scrutiny a consent judgment may receive often varies, the record here shows that the *Purcell* consent decree received careful scrutiny.

litigation, nor the trial judge, believes is valid. Accordingly, Defendants' motion for summary judgment based on collateral estoppel grounds should be denied.

Different Effects Test

The Court's inquiry does not end here, because Defendants assert a second basis for granting summary judgment that was not addressed in the previous Report and Recommendation. Defendants assert that under what has become known as the "different effects" test, Plaintiffs have failed to show libel.

The "different effects" test was explained in the seminal case of *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962). In *McCormick* the court set fourth the general principles used to govern its analysis:

> It has been held that newspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, that what the law requires is that the publication shall be substantially true, and that the mere inaccuracies, not affecting materially the purport of the article, are immaterial . . . A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Id. at 200 (citations omitted). To apply the different effects test the *McCormick* court eliminated from the articles the parts alleged to be false. The court then analyzed the edited articles and concluded that "the articles would not have produced a different effect, as the common mind would naturally understand them, than that which they produced with the alleged false parts included." Accordingly, the court held the articles were not libelous and dismissed the action. Courts since *McCormick* have consistently applied the "different effects" test to determine if an alleged libel was actionable. *See Nelson v. Associated Press*, 667 F. Supp. 1468 (S.D. Fla. 1987); *Hammond*

v. Times Publishing Co., 162 So.2d 681 (Fla. 2d DCA 1964); *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970); *Bishop v. Wometco Enterprises, Inc.*, 235 So.2d 759 (Fla. 3d DCA 1970).

In the instant case, Plaintiffs' cause of action is sufficient to pass the "different effects" test. Plaintiffs' Complaint takes issue with several of the statements made in Defendants' broadcast. After deleting the challenged portions of the broadcast the viewer is left with a different impression than the original broadcast.

To summarize, the edited broadcast * begins by giving broad prefatory information explaining how in the 70's and 80's big financiers, such as Plaintiffs, marketed real estate investments to smaller investors through the use of limited partnerships. The broadcast tells viewers that the partnerships made money until a downturn in the real estate market reduced their value. The story states that as a result of the downturn, most small investors believed that they would have to sell their real estate at a loss, but were instead offered the alternative of roll-up transactions. The report then describes what happens in a typical roll-up transaction. At this point in the edited broadcast, Plaintiffs are barely mentioned.

The first substantial reference to Plaintiffs occurs in the following portion of the report when the Levan roll-up is used as an example of an investment gone sour. The report specifically points to the Levan transaction and explains that in that roll-up the limited partners were given bonds in exchange for real estate. The edited broadcast states that many investors were given bonds with a face value of less than they invested. The report continues by stating that some of that loss was expected and this loss

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*** In their motion, Defendants' have set forth an "edited" broadcast script which deletes the "challenged" portions of the actual broadcast.**

wasn't Levan's fault, but that the problem with the bonds was that their real value depends on the health of Plaintiffs' savings and loan. The report then states that even though Plaintiffs' bank had made every interest payment thus far, the general belief that the bonds would not be paid off devalued the worth of the bonds to the point that they were considered "junk." Nothing in the broadcast to that point indicates that the transactions were inherently unfair or that Levan had any improper motives in issuing the bonds.

The next part of the report quotes a financial planner who states that the roll-ups were done for the benefit of the general partners only and not for the benefit of the limited partners. The broadcast then explains that Levan could not force the limited partners to accept the roll-up, rather the transaction had to be approved by a majority vote of the limited partners. The broadcast then explains that the root of the problem with many roll-ups, including Plaintiffs', may well be that the prospectuses are no longer understandable to the average investor and that Congress is looking into that very problem.

The abridged broadcast then airs comments made by Alan Levan in which he states that the limited partners' vote in favor of the roll up was the right decision and that in 20 years he has never failed to meet a contract obligation.

The broadcast concludes with the statement that Alan Levan's roll-up is just one of many where the general partner seemingly has done better than the limited partners and how in general small investors get burned when they invest in something they do not understand.

After deleting the contested portions of the broadcast the viewer is left with the conclusion that in general roll-ups have not benefited the smaller investor and that Plaintiffs' roll-up was no exception. The abridged broadcast indicates that the reason for this is that generally these

investors are overwhelmed by the length of prospectuses and the complexity of the transaction. In contrast to the original broadcast, the abridged version does not lead the average viewer to assume that Plaintiffs knowingly tried to dupe the limited partners into accepting an unfair transaction. Thus, the gist of the original published version does not lead the common viewer to the same conclusion as does the abridged version. Accordingly, Plaintiffs' Complaint passes the different effects test and summary judgment should not be granted.

Finally, the undersigned believes that the public interest dictates that the merits of this action be decided by a jury at trial. The First Amendment guarantees the press a right to engage in rasping and controversial discussions on all topics of public interest. However, it does not guarantee a defense against libel. So far, the public has only heard one side of the story, that is, the "20/20" broadcast. Certainly, public interest dictates that both the content of the broadcast and its production deserve scrutiny on the merits. In such cases summary judgment is not appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding where there is a reason to believe that the better course would be to proceed to a full trial, summary judgment should be denied).

RECOMMENDATION

Based on the foregoing it is the recommendation of the undersigned that Defendants' *Motion for Summary Judgment* (D.E. 68) be DENIED. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable C. Clyde Atkins, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

DONE AND ORDERED, in Chambers, at Miami, Florida, this 17 day of April, 1995.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
Chief United States
Magistrate Judge

cc: Honorable C. Clyde Atkins
Alan Fein, Esquire
Floyd Abrams, Esquire